

**U.S. Department of Labor**

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, Louisiana 70433

(985) 809-5173  
(985) 893-7351 (FAX)



**Issue Date: 12 June 2007**

**CASE NO.: 2005-LHC-2084**

**OWCP NO.: 07-162578**

**IN THE MATTER OF:**

**M.T.<sup>1</sup>**

**Claimant**

**v.**

**NATIONAL MAINTENANCE & REPAIR**

**Employer**

**and**

**SIGNAL MUTUAL INDEMNITY ASSOCIATION  
LTD.**

**Carrier**

**APPEARANCES:**

**WILLIAM S. VINCENT, JR., ESQ.  
For The Claimant**

**MAURICE E. BOSTICK, ESQ.  
For The Employer/Carrier**

**Before: LEE J. ROMERO, JR.  
Administrative Law Judge**

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<sup>1</sup> Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by M.T. (Claimant) against National Maintenance & Repair (Employer) and Signal Mutual Indemnity Association, Ltd. (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued, scheduling a formal hearing on June 30, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Employer/Carrier proffered twenty-one (21) exhibits, which were admitted into evidence. Claimant offered thirteen (13) exhibits, which were admitted into evidence along with one (1) Joint Exhibit. This decision is based upon a full consideration of the entire record.<sup>2</sup>

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

### I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured on December 28, 2001.
2. Claimant's injury occurred during the course and scope of his employment with Employer.
3. That there existed an employee-employer relationship at the time of the accident/injury.

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<sup>2</sup> References to the transcript and exhibits are as follows: Transcript: Tr.\_\_\_\_; Claimant's Exhibits: CX-\_\_\_\_, p.\_\_\_\_; Employer/Carrier's Exhibits: EX-\_\_\_\_, p. \_\_\_\_; and Joint Exhibits: JX-\_\_\_\_, p. \_\_\_\_\_. Employer/Carrier's and Claimant's exhibits contained many duplicates. Where duplicates exist, references will generally be made to only one exhibit.

4. That the Employer was notified of the accident/injury on December 28, 2001.

5. That Employer filed a Notice of Controversion on June 11, 2002.

6. That an informal conference before the District Director was held on April 29, 2004.

7. That Claimant received temporary total disability benefits from January 22, 2002 through May 3, 2002 at a compensation rate of \$377.55 in addition to "some but not all" medical benefits.

## **II. ISSUES**

The unresolved issues presented by the parties are:

1. Causation.
2. The nature and extent of Claimant's disability.
3. Determination as to when, or if, Claimant reached maximum medical improvement.
4. Entitlement to and authorization for medical care and services, particularly, Claimant's treatment with Dr. Ward Sudderth.
5. Claimant's wage earning capacity.
6. Section 8(f) special fund relief.
7. Attorney's fees.

## **III. STATEMENT OF THE CASE**

### **Background**

On December 28, 2001, Claimant was working from an unsecured ladder on a work flat when a passing vessel caused the work flat to move. Claimant fell off the ladder as a result of the movement. (Tr. 40). Claimant emerged from the fall bleeding from his forehead and feeling dizzy. (Tr. 41). He suffered a fractured nose and was referred to an ENT. (Tr. 42). He returned to work for approximately two (2) weeks after which

he stopped working as he experienced difficulty breathing in addition to a burning sensation in his nose, and headaches. After he stopped working, Claimant underwent surgery to his nose. (Tr. 43). Claimant's ENT determined Claimant reached maximum medical improvement and released Claimant from his care on April 15, 2002. (EX-15, p. 1).

Prior to being released from the care of his ENT, Claimant began to see a neurologist for treatment of his headaches. (Tr. 44-45). The neurologist recommended Claimant undergo a functional capacity evaluation. (Tr. 47-48). At his first functional capacity evaluation, Claimant complained of back pain. (Tr. 48-49). The neurologist focused his treatment of Claimant on his headaches. (Tr. 89). He suggested Claimant see another physician for his back pain. (Tr. 49). Claimant's neurologist released him to work on May 3, 2002. (Tr. 161; EX-14, p. 4). As early as June 17, 2005, Claimant alleged his pre-existing post-traumatic stress disorder was aggravated by his December 28, 2001 accident. (Tr. 109). On December 9, 2002, Claimant filed a Claim for Compensation wherein he alleged he suffered a laceration to his forehead, trauma to his nose, and back pain as a result of his accident. (CX-1, p. 8). Employer/Carrier have refused to authorize treatment of Claimant's back pain and were unaware of Claimant's claim of an alleged aggravation of his post-traumatic stress disorder. (Tr. 162, 169).

## **The Testimonial Evidence**

### **Claimant**

Claimant testified at the formal hearing. Claimant is a fifty-nine (59) year old male with a high school education who presently resides in Marrero, Louisiana. (Tr. 27-28). After graduating from high school, Claimant joined the Army and served in Vietnam. (Tr. 28). During his service in Vietnam, he received several citations, including a Combat Infantry Badge which he referred to as a "brown star." (TR. 28-29; CX-5, p. 189). Claimant received an honorable discharge from the Army. (Tr. 29). After his discharge, Claimant obtained disability benefits from the Veterans Administration ("the VA"). (Tr. 29). Claimant sought disability benefits from the VA in approximately 1970 after he became angry and nearly physical with his mother. (Tr. 29-30).

Following his military service, Claimant began work as a welder/tacker in approximately November 1970. (Tr. 30). He worked as a welder in shipyards from approximately November 1970 to the date of his accident. (Tr. 31). Although Claimant worked as a welder for approximately thirty-one (31) years, he never obtained a certification in welding. (Tr. 30-31). Welders who obtain a certification in welding receive a higher rate of pay than those who are not certified. (Tr. 32). Claimant began work with Conti Fleet in 1991. Conti Fleet was combined with Employer some time later. (Tr. 31). In total, Claimant was credited with twelve (12) years of work with Conti Fleet and Employer. (Tr. 31-32). Claimant never missed a day of work in his twelve (12) years of employment with Conti Fleet and Employer. When he worked for Employer, he worked five (5) to seven (7) days a week. (Tr. 32).

Claimant's job duties with Employer differed from his duties with Conti Fleet. (Tr. 32-33). Employer required Claimant to use twenty (20) pound mauls to break boat rudders, use five (5)-ton chain falls to take out boat rudders, carry two-hundred (200) foot welding leads, carry sixty (60) pound pumps, carry steel and ropes, put scaffold and scaffold boards up, and carry two-hundred (200) pound plates. (Tr. 33). Although some of Claimant's job duties with Employer required heavy lifting, Claimant lifted no more than fifty (50) pounds by himself. Any lifting over fifty (50) pounds was done by more than one person. (Tr. 33-34). Claimant was, however, required to climb ladders, and depending on the placement of the ladder was required, at times, to climb in excess of twenty (20) feet. (Tr. 34-35).

Claimant began to receive treatment from the VA Hospital in the 1970s. Since Claimant was also working during this time, he was unable to regularly visit for treatment. He estimated that in the beginning he went once every six (6) months for treatment. Prior to his work-related accident, Claimant had continued to receive treatment from the VA Hospital, but just not as frequently as once every six (6) months. (Tr. 35). According to Claimant, a doctor with the VA Hospital diagnosed him as suffering from "PTDS" [sic] and prescribed medication for his nerves. (Tr. 36-37). The medication and treatment Claimant received from the VA Hospital enabled him to continuously work full-time up to the date of his accident. (Tr. 36).

On December 28, 2001, Claimant reported to work at approximately 5:00 a.m. to finish a boat. He had to complete some welding work "at the top of the top." (Tr. 37). To finish the welding work, Claimant had to work off a work flat, which is a floating container that can be moved and placed where needed. (Tr. 37-38). Once placed where needed, work flats are then tied-off with a rope. (Tr. 38). Claimant placed a ladder on the work flat and extended it to the boat. (Tr. 38). Claimant estimated the height of the ladder to be approximately twenty (20) feet. The ladder was neither tied-off nor secured to the work flat. According to Claimant, when he expressed his concern to his supervisor regarding the security of the ladder, he was told to just get the job done or to leave. (Tr. 39). Claimant chose to complete the welding work. Accordingly, he climbed the unsecured ladder and began to complete the welding work. While he was completing the welding work, a ship passed by, causing the work flat to move and shake. As a result of this movement, Claimant fell off the ladder. (Tr. 40).

After falling off the ladder onto the work flat, all Claimant could recall was being told not to move by one of his co-workers. (Tr. 40). The co-worker brought a supervisor to see him. He was bleeding from his forehead and felt dizzy. The supervisor helped him walk to "first-aid." Two other co-workers, Dale Roche and Kenneth Spears, checked on Claimant while he received first-aid. Mr. Spears recommended Claimant be monitored for half an hour. After half an hour, Mr. Roche asked Claimant what he wanted to do, return to work or go home. Claimant requested to go home. (Tr. 41). Instead of going home, Claimant went to West Jefferson Hospital for treatment. The physician who examined Claimant told him he had a broken nose and a fractured skull. (Tr. 42). The physician referred him to Dr. John Kimble, an ENT specialist for treatment of his nose injury. (Tr. 42, 51).

On January 1, 2002, Claimant was asked to work. (Tr. 42). Claimant worked that day and worked for approximately two (2) more weeks. (Tr. 42-43). Claimant stopped working after two (2) weeks because his nose injury was making it more and more difficult for him to breathe. Besides difficulty breathing, he also experienced a burning sensation in his nose as well as headaches. After he stopped working, Claimant scheduled an appointment to see Dr. Kimble. (Tr. 43). Dr. Kimble told Claimant he had a fractured nose and scheduled him to undergo surgery on January 25, 2002. (Tr. 43). He also prescribed Vioxx and Vicodin for him. (Tr. 43-44). According to Claimant, the Vioxx and Vicodin helped to alleviate his nose pain, but did

not completely relieve him of headaches. (Tr. 44). Claimant did not suffer any residual problems from his nose injury after his surgery and treatment with Dr. Kimble. (Tr. 52).

Near the beginning of March 2002, Claimant was sent to see Dr. Steven Atkins for treatment of his headaches upon recommendation from Employer/Carrier. (Tr. 44-45, 52). Claimant reviewed a Choice of Physician form dated March 16, 2002, that specified Dr. Atkins as his choice of physician and confirmed that the signature on the form was his. (Tr. 46). He also confirmed that his first and second appointments with Dr. Atkins were on March 1 and March 15, 2002. (Tr. 46-47). Dr. Atkins requested Claimant undergo a functional capacity evaluation on both March 1 and March 15, 2002. (Tr. 47).

Claimant underwent a functional capacity evaluation on March 21 and March 22, 2002. (Tr. 47-48). Claimant was told not to take his pain medication before his functional capacity evaluation. (Tr. 48). At his functional capacity evaluation, Claimant started to experience back pain. (Tr. 48-49). He reported his back pain to Dr. Atkins during his March 27, 2002 appointment with him. Dr. Atkins suggested Claimant see another physician for treatment of his back pain. (Tr. 49). Dr. Atkins also recommended Claimant see Dr. Van Geffen for a neuropsychological evaluation. Claimant could not recall ever meeting with Dr. Van Geffen. (Tr. 52). Claimant could recall, however, meeting with Dr. Megan Ciota, a physician who performed a neuropsychological evaluation of him in March 2002. (Tr. 52-53; EX-9, p. 1). According to Claimant, he did not get on well with Dr. Ciota. She "got on [his] nerves" as he believed the questions she asked of him were foolish. (Tr. 53-54).

Claimant mentioned something about a "game" to Dr. Atkins. He indicated that what he meant to say was that Employer/Carrier was playing a game with him by cutting off his compensation. (Tr. 72; 92). He saw Dr. Atkins again in 2004 and continued to complain of headaches. Dr. Atkins referred Claimant to Dr. Meda Colvin, a pain management physician, and also recommended he undergo a MRI of his head and back. (Tr. 73-74). Claimant underwent a MRI of his head, but could not recall undergoing a MRI of his back except for on an earlier occasion at the VA Hospital. (Tr. 73). According to Claimant, Dr. Atkins informed him that there was nothing more he could do for him after which he sent him to see Dr. Colvin. (Tr. 75).

Claimant complained of headaches to Dr. Colvin who suggested Claimant use pain patches. (Tr. 73-74). Claimant could not recall ever receiving any pain patches. (Tr. 74). After he met with Dr. Colvin, Claimant returned to Dr. Atkins, who recommended Claimant undergo a functional capacity evaluation. (Tr. 74-75). Claimant underwent a functional capacity evaluation after which he did not try to make an appointment with Dr. Atkins as he understood Dr. Atkins to have said that there was nothing more he could do for him. (Tr. 75).

On April 4, 2002, Claimant met with Dr. Ward Sudderth for treatment of his back pain. (Tr. 49, 52). Claimant was referred to Dr. Sudderth by his attorney. (Tr. 49-51). At the time Claimant's attorney referred him to see Dr. Sudderth, his attorney had not yet taken his case. When Claimant met with Dr. Sudderth, he complained to Dr. Sudderth of back pain, breathing problems, and headaches. (Tr. 51). According to Claimant, the treatment he received from Dr. Sudderth differed from the treatment he received from Dr. Atkins in that Dr. Sudderth explained things to him and seemed more concerned about his back pain. Claimant met with Dr. Sudderth twice a month and also participated in physical therapy sessions during those times. (Tr. 54). At each meeting, Claimant first met with the physical therapist who put heated pads on his back after which Claimant met with Dr. Sudderth. (Tr. 54-55). Dr. Sudderth examined Claimant's back, inquired about any complaints of pain, and prescribed pain medication for Claimant, namely, Celebrex and Soma. Claimant attended every appointment scheduled for him with Dr. Sudderth and reported that physical therapy really helped him. (Tr. 55). Claimant last saw Dr. Sudderth some time before Hurricane Katrina. (Tr. 55-56).

After his accident, Claimant increased the frequency of his visits to the VA Hospital for treatment of his post-traumatic stress disorder. He went to the VA Hospital every month to every two (2) months for treatment. Claimant participated in a few group meetings at the VA Hospital. According to Claimant, his mental state changed after his accident in that he became more nervous, suffered from headaches, had an increase in violent thoughts, was quick to anger, and thought about harming others. (Tr. 56). Claimant's treating psychiatrist at the VA Hospital prescribed medication for his anger as well as a medication to help him sleep. (Tr. 56-57). Since Hurricane Katrina, Claimant has been unable to locate his physician with the VA Hospital. He sent a letter to the VA notifying them of his inability to locate his doctor and requested an appointment for treatment. (Tr. 69-70).

Claimant now suffers from memory loss as a result of his accident. Since his accident, Claimant is unable to remember things very well. Sometimes Claimant cannot remember things that happened some time ago and other times he cannot remember things that happened last week. When he is stressed, he cannot remember anything at all. According to Claimant, he is easily stressed as well as easily angered. It is during times when he is stressed or angry that he thinks "things" and says "things" that are "out of the ordinary." (Tr. 57).

Employer/Carrier stopped paying Claimant compensation on May 3, 2002. (Tr. 57-58). In 2003 Claimant earned fifty dollars (\$50) a day working for a friend at a seafood market. (Tr. 58-59). At the seafood market, Claimant worked six (6) to seven (7) hours a day three (3) days a week. Claimant worked at the seafood market for approximately four (4) to five (5) months. (Tr. 59, 64). He quit his employment at the seafood market after he "got into it" with the owner of the market. (Tr. 59). He acknowledged that he lied in his deposition when he said he was not working. He also acknowledged that lying was wrong. (Tr. 60-61). According to Claimant, he wore a back brace given to him by Dr. Sudderth when he worked at the seafood market and also continued to take his pain medications. (Tr. 61-62).

Claimant was documented in a surveillance video working at the seafood market. (Tr. 58, 62). According to Claimant, the surveillance video showed him placing frozen fish or shrimp in a container to thaw. After the fish or shrimp thawed, Claimant placed the fish or shrimp in a basket for distribution "in the store." (Tr. 62). Claimant became upset with the owner of the store because she claimed to sell fresh shrimp when she actually sold frozen shrimp. He believed what she was doing was wrong and told her so. (Tr. 62-63). The second time he voiced his opinion regarding her claims, he was fired. (Tr. 63).

While working at the seafood market, Claimant continued to experience back pain and headaches. He continued to take his pain medication and otherwise worked through his pain. (Tr. 64). He kept his pain medication in a plastic bag in his car. Claimant is shown in the surveillance video taking something out of a plastic bag in his car. According to Claimant, the video showed him retrieving pain medication from his car. (Tr. 65). Claimant recalled that he "probably" missed a few days of work at the seafood market because of pain. (Tr. 66).

Some time after his accident, Claimant applied for Social Security disability benefits. Social Security sent Claimant to see a psychiatrist and a consulting physician. (Tr. 66-67; CX-10, p. 4). Claimant informed the psychiatrist and consulting physician of his accident. Following a hearing on the matter, Claimant was awarded Social Security disability benefits retroactive to the date of his accident. According to Claimant, he did not inform Social Security of his work at the seafood market because no one with Social Security asked him if he was working. (Tr. 67).

Claimant attended three (3) appointments with Dr. Macgregor. Dr. Macgregor spoke with Claimant as well as his wife. Claimant thought Dr. Macgregor was nice and pleasant. (Tr. 68). He met with Dr. Culver on only one (1) occasion. (Tr. 68-69). Dr. Culver arrived late to his appointment with Claimant. According to Claimant, he did not get along well with Dr. Culver. He did not like that Dr. Culver arrived late to his appointment and also felt Dr. Culver "took his time" during the examination. (Tr. 69).

According to Claimant, he is not able to return to his former employment with Employer because of lifting requirements, specifically, lifting of welding lines, iron, and pumps. (Tr. 70). Currently, Claimant maintains he suffers from headaches, back pain, nervousness, and memory problems. The state of his nerves is such that he is quick to anger and becomes so angry that he kicks walls. (Tr. 76). He maintains that his nervousness impedes his ability to work in that it makes it difficult for him to accept instruction or direction from anyone. It is hard for him to take "orders" from someone with authority over him. (Tr. 77).

On cross-examination, Claimant indicated he was not fired from his employment at the seafood market; rather, he was told he "could go." It was due to his anger toward the owner of the store that he was asked to leave. (Tr. 78). He could not recall telling Nancy Favaloro, a vocational counselor, that he quit his employment at the seafood market because of his headaches and back pain. He confirmed that it was during his first functional capacity evaluation that his back pain developed. According to Claimant, prior to his functional capacity evaluation, he had just been lying around and taking medication. (Tr. 79). Although he confirmed his back pain developed during his functional capacity evaluation, he indicated his back hurt some prior to the evaluation, but just not as bad as during the evaluation. (Tr. 79-80). He also

indicated that his back pain worsened after his functional capacity evaluation. He indicated he informed a physician prior to his functional capacity evaluation of his back pain, but could not recall which physician he informed or when he so informed the physician. (Tr. 80).

Gavin Matthews, the therapist who conducted Claimant's first functional capacity evaluation upon request of Claimant's treating neurologist, Dr. Atkins, indicated that on the first day of testing Claimant reported a sudden episode of low back pain prior to testing. (Tr. 80-81; EX-8, p. 1). According to Claimant, he complained to Mr. Matthews of back pain, but maintained that he suffered from back pain prior to the evaluation. (Tr. 81). Mr. Matthews noted that Claimant's complaints of back pain were less on the second day of testing. (Tr. 81; EX-8, p. 1). However, Claimant could not recall telling Mr. Matthews that he experienced less back pain during the second day of testing. (Tr. 81-82).

Claimant reviewed a copy of his deposition testimony from January 2006. (Tr. 82). He acknowledged that he lied in his deposition about not being employed anywhere or earning any money since his accident. (Tr. 82-85). He also acknowledged that he lied when he said that he couldn't lift anything, couldn't bend, couldn't engage in any physically demanding activity, and suffered from vision problems as a result of his accident. (Tr. 84). Claimant reviewed a Social Security Administration Decision dated October 13, 2004, wherein he testified he had not engaged in substantial gainful activity since his accident. (Tr. 85; CX-10, p. 2). He could not recall telling anyone at Social Security Administration that he had not worked anywhere since his accident. (Tr. 86-87). He indicated, however, that while he was employed at the seafood market, he was not receiving Social Security benefits. (Tr. 87).

Claimant could not recall telling Dr. Mary Mathai, the consulting physician in his Social Security Administration proceeding, that he could only sit for ten (10) minutes, stand for five (5) minutes, and only lift items up to five (5) pounds in weight. (Tr. 87; CX-10, p. 4). Claimant acknowledged that his job requirements at the seafood market included bending, stooping, and lifting hampers half-full to full of shrimp. (Tr. 87-88). Claimant estimated that a full hamper of shrimp weighed between forty (40) to fifty (50) pounds. Claimant confirmed that he worked at the seafood market three (3) days a week for six (6) to seven (7) hours a day for four (4) or five (5) months. (Tr. 88).

March 20, 2002, is the first date in Claimant's medical records upon which he complained of back pain. Claimant could not recall complaining to a physician of back pain prior to that date. (Tr. 88). He could also not recall telling Dr. Atkins during one of their appointments that his back started hurting the previous week. (Tr. 88-89). According to Claimant, his appointments with Dr. Atkins were focused on his headaches. Claimant confirmed Dr. Kimble was the physician who treated his nose injury. (Tr. 89). He indicated that Dr. Kimble released him from his care, but not back to work. (Tr. 89-90). He also indicated that Dr. Atkins released him from his care, but not back to work. (Tr. 90).

Claimant underwent a functional capacity evaluation in 2002 and in 2004. (Tr. 90). He maintained that he put forth full effort and tried his best. He disagreed with the evaluator's findings which indicated symptom magnification as well as that he did not put his full effort forth and was self-limiting. (Tr. 90-91). Claimant also underwent a neuropsychological evaluation. Claimant indicated he cooperated only part of the time during his neuropsychological evaluation because the physician conducting the evaluation got on his nerves. Nevertheless, he disagreed with the physician's findings that he was uncooperative, didn't put forth his best effort, and falsified some answers. (Tr. 91).

Claimant confirmed he has received treatment for psychological problems, including post-traumatic stress disorder since his return from Vietnam. He also confirmed that he received disability for his psychological problems prior to his accident. (Tr. 92). According to Claimant, after his accident his psychological problems escalated in that he suffered from headaches, blurred vision, nervousness, and anger problems. (Tr. 92-93). Claimant acknowledged that at his deposition he testified that since his accident he suffers from anger and memory problems as well as feelings of isolation. (Tr. 93-94). He also acknowledged that during his deposition he did not mention his headaches or back pain, but suggested that he did not do so because he was angered by the questioning. (Tr. 94-95).

According to Claimant, he did not suffer from memory problems before his accident. (Tr. 95). He reviewed a reprint of a final report prepared by the VA from September 2001 wherein he reported he suffered from memory problems and had difficulty concentrating. (Tr. 95; CX-5, p. 195). The reprint did not

help to refresh Claimant's memory as to any memory problems from which he may have suffered prior to his accident. (Tr. 95-96). Claimant, however, acknowledged that he suffered from anger problems and feelings of isolation before his accident. (Tr. 96). He denied stating three (3) months before his accident that he disliked his job although the reprint of the final report from September 2001 indicated he stated just that. (Tr. 96-98; CX-5, p. 196). Claimant also denied stating that he no longer enjoyed working for Employer after he was moved to another site for speaking his mind, he denied being moved to a place referred to as "the killing field" known so because employees activities are heavily monitored, and denied stating he no longer found his job fulfilling as he once did. (Tr. 98-100; CX-5, p. 193). Rather, Claimant acknowledged he said those things about his employment with Conti Fleet, not about his employment Employer. (Tr. 99-100). Claimant maintained that he made those statements in regard to his employment with Conti Fleet even though the reprint of the final report was dated September 2001, a date at which Claimant was working for Employer. (Tr. 100).

Claimant confirmed that he suffered from nervousness, visual and auditory hallucinations, suicidal thoughts, homicidal thoughts, distressing nightmares, depression, frequent crying spells, lack of energy, and feelings of restlessness before his accident. (Tr. 104-105; CX-5, p. 195). He nevertheless maintained that his symptoms worsened after his accident since he did not suffer from headaches prior to his accident. (Tr. 105). He also maintained that he did not suffer from back pain before his accident. (Tr. 105-106).

Claimant could not recall the date upon which Employer/Carrier was notified that he was claiming an aggravation of his post-traumatic stress disorder as a result of his accident. (Tr. 106-109). He disagreed, however, that Employer/Carrier was not notified of his aggravation claim until 2006. (Tr. 106). He did confirm, though, that prior to June 17, 2005, he did not tell Employer/Carrier or his attorney that he was claiming aggravation of his post-traumatic stress disorder. (Tr. 109; CX-1, p. 1).

Claimant reviewed an accident report which he confirmed he signed. (Tr. 109-110; EX-5, p. 2). The report indicated Claimant was injured when he fell five (5) feet off an unsecured ten (10)-foot wooden ladder on a work flat. (Tr. 110; EX-5, p. 2). Claimant disagreed with the report, but acknowledged that he signed it. Claimant also reviewed a Choice of Physician form

which he confirmed he signed. (Tr. 110-111). He acknowledged that his case worker told him he could choose any physician he wanted, but recommended Dr. Atkins as a good physician. Claimant confirmed he chose Dr. Atkins as his physician. (Tr. 111). Claimant also confirmed that he was referred to Dr. Sudderth by his attorney and that he has not seen another physician for treatment of his back pain since Hurricane Katrina. According to Claimant, since Katrina he has been taking Advil in addition to pain medication from the VA Hospital for his back pain. (Tr. 112).

In 2001 Claimant petitioned the VA for an increase in his disability benefits. Claimant confirmed that as of September 17, 2001, his post-traumatic stress disorder was worsening, which is why he petitioned for an increase in disability benefits. (Tr. 101). According to Claimant, at that time he was receiving thirty percent (30%) disability and his social worker recommended he petition for fifty percent (50%). (Tr. 101-103). Claimant confirmed that he reported to the VA that his post-traumatic stress disorder symptoms were worsening to such an extent that he was "getting disgusted." (Tr. 103; CX-5, p. 196). However, he maintained that most of what he told the VA was a fabrication created by his social worker. (Tr. 103).

On re-direct examination, Claimant confirmed that he tried to increase his VA disability from thirty percent (30%) to fifty percent (50%) prior to his accident on the advice of his doctor. After his accident, he was reevaluated and awarded one-hundred percent (100%) disability. According to Claimant, he sees his physician at the VA Hospital approximately once a month. (Tr. 113-114). He maintained that he has been receiving his medication from the VA Hospital and that the Hospital has been monitoring his medications. He was not able to get his medications after Hurricane Katrina, but maintained that he had enough medication sent to him in bulk prior to the storm to suffice. (Tr. 114). He acknowledged that he does not take all of his prescribed medications and indicated he wanted to speak to his physician before taking some of the medications because of the way they affect his mood. (Tr. 114-115).

Claimant confirmed that he did not take any of his prescription medication during his first functional capacity evaluation as he maintained he was told not to take any medications prior to the evaluation. (Tr. 115). He indicated that fabrication might not have been the correct word to use to describe his petition for an increase in VA benefits, but he confirmed that he petitioned for the increase on the advice of

his physician and social worker. (Tr. 115-116). He also again apologized for lying in his deposition about his employment at the seafood market and acknowledged that it was wrong of him to lie. (Tr. 116-117).

On rebuttal, Claimant acknowledged that he handwrote the description of his accident on an accident report. (Tr. 216; EX-5, p. 1). He denied that he handwrote the description of his injuries on the report, but acknowledged that he signed the report. (Tr. 216-217; EX-5, p. 2). Claimant indicated he did not believe the information contained in the accident report following his signature was completed when he signed the report. (Tr. 217; EX-5, p. 2). He indicated he believed the handwriting on the report to be the handwriting of Dale Roche. According to Claimant, Mr. Roche did not discuss with him what he did wrong nor did he witness the accident. (Tr. 217).

According to Claimant, post-traumatic stress disorder patients show up for treatment at the VA Hospital dressed in military fatigues or Vietnam Veterans caps. (Tr. 218). He indicated he himself has shown up for treatment dressed in military fatigues or with a Vietnam Veterans cap and that he is proud to wear his fatigues because of his service to his country. (Tr. 218-219). Claimant believes it is normal to wear fatigues and Vietnam Veterans caps as well as to watch war movies. He indicated that watching war movies is a form of therapy for him. (Tr. 219). On further cross-examination, Claimant denied telling Mr. Roche that he was welding off a ten (10)-foot wooden ladder. (Tr. 219-220). According to Claimant, he fell off a twenty (20)-foot a-frame aluminum ladder. (Tr. 220).

#### **Rennie Culver, M.D.**

Rennie Culver, M.D., testified at the formal hearing. Dr. Culver is an expert in psychiatry who evaluated Claimant on May 22, 2006. (Tr. 120-121). At the May 22, 2006 appointment, Dr. Culver conducted a standard psychiatric evaluation of Claimant. (Tr. 120). The evaluation took approximately two and one-half (2½) hours during which time he obtained a complete personal history from Claimant, including educational, marital, military, family, psychiatric, and medical histories. (Tr. 120-121). After obtaining a complete personal history from Claimant, Dr. Culver performed a formal mental status examination and reviewed

Claimant's medical records. He concluded from his evaluation and review of medical records that Claimant was a malingerer, fabricating symptoms of mental and physical illness. (Tr. 121; EX-1, pp. 20-22).

Dr. Culver indicated he relies on neuropsychological testing in his field and sometimes refers patients out for such testing. (Tr. 121). According to Dr. Culver, neuropsychological testing is important in that it is the only way to determine whether an individual suffers from a cognitive dysfunction as a result of a lesion or injury of the central nervous system. (Tr. 121-122). There are other methods through which to determine if a person suffers from a cognitive dysfunction such as a neurological examination, a clinical exam, a MRI, an EEG, and a CAT Scan. However, neuropsychological testing is the best method to determine the specific nature of a cognitive dysfunction and is helpful in localizing the areas of dysfunction in the brain. Nevertheless, findings from neuropsychological testing must be correlated with a patient's history and medical records. (Tr. 122).

According to Dr. Culver, a neuropsychologist can determine through neuropsychological testing whether a patient is magnifying symptoms or malingering. (Tr. 123-124). He reviewed the findings of Dr. Ciota, the neuropsychologist who performed neuropsychological testing on Claimant, and determined Claimant was a malingerer as that was Dr. Ciota's diagnosis. (Tr. 124). He also determined Claimant was a malingerer through an interview procedure he conducted which is designed to establish whether a patient is being straightforward. (Tr. 124-125). As part of this interview procedure, Dr. Culver asked Claimant to describe his auditory hallucinations, specifically, if he heard voices in his left ear or right ear. (Tr. 125). Claimant assured Dr. Culver he heard the voices in only his right ear. (Tr. 125; EX-1, pp. 7, 20). Dr. Culver found Claimant's assurance suspect since a person suffering from auditory hallucinations would perceive the voices as coming into both ears. (Tr. 125-126). Dr. Culver also asked Claimant if the voices he heard were intelligible. Claimant told him that one of the voices was intelligible, but another voice, the voice of his father, was unintelligible. Dr. Culver concluded based upon accepted medical literature, particularly literature by Dr. Philip Resnick, that Claimant was malingering since Dr. Resnick's literature indicates that people who suffer from auditory hallucinations hear the hallucinations as intelligible. (Tr. 126; EX-1, p. 20).

Dr. Culver also asked Claimant questions pertaining to rare psychiatric conditions to determine if he was malingering. One of these questions was whether he smelled odors when there was no "apparent source" of the odor. (Tr. 126; EX-1, pp. 7, 20). Claimant indicated he smelled smoke, gas, and decay and has suffered from smelling these odors ever since his nose surgery. (Tr. 126-127; EX-1, p. 7). According to Dr. Culver, olfactory hallucinations are very rare and usually always occur in the context of a specific type of lesion to the central nervous system. People who suffer from seizures tend to also suffer from olfactory hallucinations. Dr. Culver acknowledged that Claimant claims to suffer from seizures, but indicated that there is nothing in his medical records to show that he has been treated for seizures. Dr. Culver queried whether Claimant felt "things" on him when there was nothing there. (Tr. 127; EX-1, pp. 7, 20). Claimant told him he felt something fuzzy touching him and had periodically felt it for three (3) or four (4) years. (Tr. 127). According to Dr. Culver, tactile hallucinations are rare and Claimant's contention that he suffers from that type of hallucination was another indication of malingering since such hallucinations were inconsistent with his personal history. (Tr. 127-128; EX-1, p. 20).

Dr. Culver also inquired of Claimant's dream pattern. Claimant maintained that all his dreams were nightmares about someone trying to choke him. (Tr. 128; EX-1, p. 8). Dr. Culver noted that it is impossible to determine what anyone dreams of, but indicated that there is a technique to determine if the dreaming pattern is credible. Consistent with this technique, Dr. Culver asked Claimant if he had any good dreams, or any dreams that were neither good nor bad. Claimant claimed that he had no dreams other than his nightmares. Dr. Culver found such a dreaming pattern impossible and concluded that Claimant's claims of only having nightmares was another indication that he was malingering. (Tr. 128; EX-1, p. 19).

While Claimant has been treated for post-traumatic stress disorder since his return from Vietnam, Dr. Culver found his symptoms suspicious. (Tr. 29). Dr. Culver found it unusual that Claimant indicated he suffered from "PTDS" instead of PTSD. (Tr. 29; EX-1, p. 4). He also found it unusual that Claimant wore a Vietnam Veteran cap since people who suffer from post-traumatic stress disorder generally do not possess things that remind them of what caused their post-traumatic stress disorder. (Tr. 129; EX-1, p. 18). For the same reason, Dr. Culver found

it suspicious that Claimant wore his "combat uniform" to his third visit with Dr. Macgregor and indicated during his interview with Dr. Culver that he just watched a war movie and "liked it." (Tr. 129-130; EX-1, p. 18).

Dr. Culver noted that Dr. Ciota's neuropsychological testing was consistent with his diagnosis of malingering. (Tr. 130; EX-1, pp. 12-13). He also noted that Dr. Atkins's determination that Claimant was magnifying his symptoms was consistent with his diagnosis of malingering. (Tr. 130). He further noted that the findings of the two (2) functional capacity evaluations indicating that Claimant was magnifying his symptoms, self-limiting, and failed to put forth his full effort were consistent with his diagnosis of malingering. (Tr. 130-131; EX-1, p. 16). Dr. Culver also found that waiting three (3) months after an accident to report a new symptom raises the possibility of malingering. He additionally found that claiming to have fallen twenty (20) to twenty-five (25) feet off of a ladder and fracturing his skull, when he fell five (5) feet and fractured his nose was also consistent with malingering. (Tr. 131; EX-1, p. 16).

In addition, Dr. Culver found Claimant's claim that he suffered a fractured skull inconsistent with his medical records as he found nothing in Claimant's medical records indicating he fractured his skull. (Tr. 131-132). He further found Claimant's statement to him that he was not injured in Vietnam inconsistent with a statement Claimant made to an examiner with the VA Hospital wherein he indicated he was wounded in Vietnam. (Tr. 132; EX-1, pp. 16-17). According to Dr. Culver, inconsistency is an indication of malingering. (Tr. 132). He also noted that lying in a deposition is consistent with malingering as well as a disregard for the truth. (Tr. 132-133).

On cross-examination, Dr. Culver denied that ninety-five percent (95%) of his practice consists of referrals from insurance companies. Instead, he indicated that eighty percent (80%) of his practice consists of referrals from insurance companies while the remainder of his practice consists of forensic psychiatry and general outpatient psychiatry. (Tr. 133). He confirmed he has not received any analytical training, but noted that he had psychiatric training. (Tr. 133-134). Dr. Culver denied that he ever testified that ninety-five percent (95%) of his practice consists of referrals from insurance

companies, but noted that he indicated that ninety-five percent (95%) of independent medical exams referred to him were referred to him by insurance companies. (Tr. 134-135).

Dr. Culver also noted that he testified in a Civil District Court case some twenty (20) years ago that he found fifty percent (50%) of the patients he saw for independent medical exams to be malingering. He also noted that at the time of his testimony in Civil District Court there was a high rate of unemployment in Louisiana and indicated that incidences of malingering tended to rise with the rate of unemployment. (Tr. 135, 138-139). Since that time he has not found fifty percent (50%) of his independent medical exam patients to be malingerers. (Tr. 135-136, 138-139). To illustrate, approximately five (5) or six (6) years ago he reviewed fifty (50) independent medical exams performed that calendar year to determine a percentage of his findings in those cases as to malingering. He found that in ten percent (10%) of those cases, or in five cases, he diagnosed the patients as malingering. He diagnosed the patients in the other forty-five (45) cases as either suffering from a mental illness, such as paranoid schizophrenia or post-traumatic stress disorder, or suffering from no mental illness at all. (Tr. 135).

Dr. Culver acknowledged that in the case of Anderson v. State Farm in June 1995 he testified that according to literature by a nationally known forensic psychiatrist, Dr. Henderson, fifty percent (50%) of people who claim to be injured in workers' compensation or personal injury cases either "had nothing wrong with them" or were malingering. (Tr. 139-140). He also acknowledged inconsistencies in a psychiatric report raises questions as to the accuracy of diagnosis in that report. (Tr. 141). Dr. Culver confirmed he only spoke with Claimant during his evaluation of Claimant. He could not recall arriving late to the appointment. He also could not recall Claimant's wife becoming agitated because she had to leave for work. He additionally could not recall taking a break during his evaluation of Claimant, but noted that he indicated in his report that there was one (1) break taken. (Tr. 143). Dr. Culver indicated that he tells patients at the commencement of an evaluation that if they need to take a break that he will happily accommodate them. His evaluation of Claimant lasted approximately two and one-half (2½) hours. He indicated that one (1) break during those two and one-half (2½) hours was reasonable. (Tr. 144).

Dr. Culver noted that the records he reviewed from the VA indicated Claimant has been treated for post-traumatic stress disorder since 1998. He noted that during his interview, Claimant told him he began to receive treatment from the VA Hospital for post-traumatic stress disorder in the late 1980s. He indicated that Claimant never mentioned receiving treatment for post-traumatic stress disorder in the 1970s. (Tr. 144). The records Dr. Culver reviewed indicated Claimant was seen quite often for treatment of post-traumatic stress disorder and was consistently diagnosed as suffering from the disorder. (Tr. 145). Nevertheless, Dr. Culver took issue with the findings of the psychiatrist in Claimant's social security proceeding, Dr. Helen Mason. He expressed no opinion as to Dr. Mason's general assessment of Claimant other than noting that her general assessment was what Claimant reported to her and could only be as accurate as the reporting. (Tr. 145-147).

Dr. Culver concluded Claimant does not suffer from a psychiatric impairment that precludes him from working. (Tr. 147). He suggested, however, that Claimant suffers from a personality disorder manifested by "a less than scrupulous regard for the truth" and a tendency to exaggerate symptoms. (Tr. 147-148). Dr. Culver confirmed he only gave Claimant the choice of his right or left ear when he questioned Claimant about from which ear he experienced auditory hallucinations. He was unable to say whether a right-handed person would hear better from his right ear. (Tr. 148). He was also unable to say whether Claimant's nose surgery affected his sense of smell. (Tr. 148-149). He acknowledged, though, that Claimant complained to Dr. Kimble of a loss of sense of smell. He noted, however, that there was nothing in Claimant's medical records to indicate that his nose surgery altered his sense of smell such that he should smell things that are not there. Dr. Culver acknowledged nonetheless that two (2) people in a room could differ as to whether there was an odor in the room depending on the proximity of the people to one another. (Tr. 149).

Dr. Culver acknowledged that Claimant had been prescribed Lamictal, a medication used for treating seizures and as a mood stabilizer. (Tr. 151). He remembered a reference in Claimant's medical records by Dr. Eric Whitfield wherein Dr. Whitfield noted Claimant reported suffering "dissociative spells." That was the closet entry in Claimant's medical records Dr. Culver could recall that indicated Claimant suffered from seizures. (Tr. 151-152). He noted that Dr. Atkins, a neurologist, made no

note of Claimant suffering seizures. He acknowledged, however, that a physician who treated a patient over the course of several years would be in a better position to know the patient's current complaints. (Tr. 152).

Dr. Culver indicated he did not have enough personal familiarity with the physicians at the VA Hospital Post-Traumatic Stress Disorder Clinic to take issue with their competency. (Tr. 152-153). He also indicated that he was not familiar enough with patients at the Clinic to know whether they showed up to their appointments dressed in fatigues or with Vietnam Veteran caps. He further indicated that he expected physicians with the Clinic to have more patients that suffered from post-traumatic stress disorder than an average psychiatrist in private practice. (Tr. 153). He noted that theoretically those physicians' expertise should be enhanced by their large percentage of post-traumatic stress disorder cases. (Tr. 153-154). Dr. Culver could not recall if he reviewed an August 26, 2004 report from Dr. Mathai. (Tr. 154). He confirmed, however, that he was not given Dr. Sudderth's entire file for review. (Tr. 154-155).

On re-direct examination, Dr. Culver confirmed that in diagnosing post-traumatic stress disorder a physician must rely in large part on symptoms reported by a patient. (Tr. 155). He acknowledged that there are also collateral sources of information used in diagnosing post-traumatic stress disorder. Nevertheless, he indicated that if a patient lies about his symptoms or impairments or exaggerates his symptoms, a diagnosis of post-traumatic stress disorder is questionable as it would be based on factually incorrect data. (Tr. 156).

#### **Taanda L. Michel**

Taanda L. Michel testified at the formal hearing. Ms. Michel is a nurse case manager and managed Claimant's case from February 15, 2002 to August 9, 2002. (Tr. 158; EX-17, pp. 1-35). Claimant was complaining of headaches following his nose surgery. (Tr. 158; EX-17, p. 30). Ms. Michel arranged a neurological evaluation for Claimant to evaluate his complaint of headaches. (Tr. 158; EX-17, pp. 31-32). Ms. Michel met with Claimant shortly after she was assigned his file and obtained a personal history from him. At that time, Claimant had no complaints of back pain. He also did not complain of any psychological problems. He complained of headaches, fatigue, and of experiencing a burning sensation in his nose. (Tr. 159; EX-17, pp. 30-31).

According to Ms. Michel, it is customary for a nurse case manager to meet with a claimant who is to be referred to another physician to give that claimant a list of qualified physicians from which to select a physician. (Tr. 159-160). In compiling a list of qualified physicians, Ms. Michel reviews the claimant's medical records to determine which type of physician the claimant needs to see after which she searches the AMA physician selector website and comprises a list of physicians within commuting distance of the claimant's residence. (Tr. 160). The list is then provided to the claimant and Ms. Michel informs the claimant that he is entitled to select a physician from the list, or if the claimant knows of a physician he would rather see, an appointment would be made with that physician. Ms. Michel comprised such a list for Claimant that listed several neurologists. (Tr. 160-161). Claimant selected Dr. Atkins. He completed and signed a Choice of Physician form indicating his choice. (Tr. 161; EX-17, p. 30).

Dr. Atkins released Claimant back to work in May 2002. (Tr. 161; EX-17, p. 15). Once Dr. Atkins released Claimant back to work, Ms. Michel was instructed by Employer/Carrier to close Claimant's file as Claimant was "due to be at maximum medical improvement." (Tr. 161-162). Claimant never indicated to Ms. Michel that he was suffering from psychological problems or post-traumatic stress disorder as a result of his accident. (Tr. 162).

On cross-examination, Ms. Michel confirmed Claimant was provided a list of physicians from which he chose Dr. Atkins as his physician. (Tr. 162, 180). She could not explain why Claimant's Choice of Physician form was dated March 16, 2002, when Claimant's first appointment with Dr. Atkins was on March 1, 2002. She confirmed, however, that the Choice of Physician form was signed by Claimant during their initial meeting in April 2002 and suggested that the date might have been filled in at some later time. (Tr. 180-182).

Ms. Michel acknowledged that Claimant had complained of back pain to the physical therapist during his functional capacity evaluation. (Tr. 162; EX-17, pp. 24-25). She was unaware of anyone telling Claimant to discontinue his pain medication during the evaluation. She noted that she had told Claimant not to discontinue use of his pain medication. (Tr. 162-163). According to Ms. Michel, a physical therapist conducting a functional capacity evaluation would instruct a patient on whether to take pain medication prior to the

evaluation. (Tr. 163-164). For her part, she instructs her patients to take their pain medication prior to going to physical therapy. (Tr. 163).

To Ms. Michel's knowledge, Dr. Atkins never treated Claimant's back pain. (Tr. 164, 169). Claimant did not complain of back pain until some time after the date of his accident. (Tr. 169; EX-17, p. 25). Accordingly, Employer/Carrier determined Claimant's back pain was unrelated to his accident. (Tr. 169-170). Since Employer/Carrier determined Claimant's back pain was unrelated to his accident, Employer/Carrier refused to pay for treatment of his back pain. (Tr. 169). Nevertheless, a lumbar MRI was ordered although it was unclear to Ms. Michel upon whose recommendation the MRI was ordered, Dr. Sudderth's or Dr. Atkins'. (Tr. 170, 172). There was no notation in Claimant's medical records indicating any physician found Claimant's back pain to be unrelated to his accident. (Tr. 170-171). There was a notation in Dr. Atkins's records which indicated Claimant complained of back pain at his functional capacity evaluation. Since Claimant did not complain of back pain until months after his accident, Employer/Carrier determined it was unrelated to his accident and did not request Dr. Atkins evaluate his complaints of back pain. Instead, Claimant was told by Dr. Atkins to see another physician for evaluation of his back pain. (Tr. 171). Therefore, Employer/Carrier refused to authorize the lumbar MRI. (Tr. 172).

Ms. Michel met with Dr. Atkins on several occasions to discuss Claimant's condition. She usually met Dr. Atkins with Claimant, but on one (1) occasion she met with him by herself. (Tr. 164). She denied that she asked Dr. Atkins to release Claimant back to work. (Tr. 164-165). Rather, she requested Dr. Atkins determine whether Claimant reached maximum medical improvement. After which she recommended to Employer/Carrier that should Dr. Atkins not find Claimant to have reached maximum medical improvement, a rehabilitation conference be scheduled. (Tr. 165). Ms. Michel indicated she recommends rehabilitation conferences to either determine if the patient is going to be discharged or simply to gain an understanding of the patient's treatment plan. (Tr. 165-166). She acknowledged that although Dr. Atkins released Claimant back to work on May 3, 2002, she did not close Claimant's file until August. (Tr. 166). She also acknowledged she read a report from Dr. Atkins dated April 8, 2002, wherein Dr. Atkins suggested Claimant see a primary physician and an ophthalmologist. (Tr. 166-168).

Ms. Michel confirmed that Dr. Atkins' clinic was in New Orleans and that he was a specialist in headaches. She also confirmed that she received initial medical records from Dr. Sudderth which she reviewed and after which she closed Claimant's file. She could not recall requesting authorization from Employer/Carrier for Claimant to undergo a lumbar MRI. (Tr. 174). As medical case manager, Ms. Michel indicated she facilitates treatment for patients' work-related injuries. (Tr. 174-175). Since Claimant's back pain was not reported at the time of his accident, it was not considered work-related. According to Ms. Michel, she only facilitates treatment for work-related injuries. She indicated she would not refer a patient that develops a toothache to a dentist because the toothache is not a work-related injury. She indicated she would, however, tell the patient that he should see a dentist with the understanding that workers' compensation would not pay for the dental care. (Tr. 175).

Ms. Michel indicated Claimant reported he fell several feet onto a work flat and that with every doctor's visit he increased the distance from which he fell. (Tr. 175; EX-17, pp. 29-30). She also indicated that had Claimant fallen twenty (20) feet onto a work flat as he claims, he would have experienced a loss of consciousness which he did not report experiencing. (Tr. 176). Ms. Michel did not review medical records from Dr. Mathai and has not reviewed any additional medical records since she closed Claimant's file in August 2002. (Tr. 177). Once she prepared her final report on September 1, 2002, Ms. Michel did not receive any additional medical records or reports from Employer/Carrier. (Tr. 177-178). She acknowledged, however, that on August 20, 2002 she received copies of Dr. Sudderth's initial reports. (Tr. 178).

Ms. Michel indicated she was aware that Claimant saw Dr. Sudderth, a general surgeon. She also indicated that she did not consider Dr. Sudderth to be a primary physician; rather, she considered him to be a general surgeon. She acknowledged that a general practitioner could be considered a primary physician. Ms. Michel agreed that if Dr. Sudderth limited his practice to general practice he could be considered a primary physician. Claimant first met with Dr. Sudderth on April 4, 2002. Ms. Michel indicated that at that time she was unaware that Claimant was treating with Dr. Sudderth. (Tr. 168). She also indicated that she did not speak with Dr. Sudderth since Claimant was referred to a primary care physician for high blood pressure and to an ophthalmologist for blurred vision, which were determined to not be related to his accident. (Tr. 168-169).

Claimant never informed Ms. Michel that he was receiving treatment from the VA Hospital for post-traumatic stress disorder. Ms. Michel also did not review any medical records which indicated Claimant was receiving treatment for post-traumatic stress disorder. She did note that in Dr. Ciota's report there was a mention of Claimant receiving treatment for Agent Orange. According to Ms. Michel, Claimant did not inform Dr. Ciota of his treatment for post-traumatic stress disorder. (Tr. 172). On re-direct examination, Ms. Michel confirmed that in her March 19, 2002 report she noted Claimant reported falling several feet. (Tr. 182; EX-17, p. 29).

**Ward Sudderth, M.D.**

Ward Sudderth, M.D., testified at the formal hearing. Dr. Sudderth is an expert in the fields of general surgery and medicine. (Tr. 184-185). Dr. Sudderth met with Claimant on April 4, 2002. Claimant reported that on December 28, 2001, he was working on a dry dock when he was knocked off a ladder and fell approximately twenty (20) feet onto a steel platform. He also reported that he received first aid for a laceration of his forehead and that he suffered a bloody nose and developed black eyes a few days after the accident. (Tr. 185-186; CX-4, p. 175). Claimant additionally reported that he was treated at an emergency room where x-rays were taken, prescriptions given, and where he was referred to Dr. Kimble. Dr. Kimble performed surgery on Claimant's nose on January 25, 2002. After Claimant's nose surgery, Claimant was seen by Dr. Atkins. (Tr. 186; CX-4, p. 175).

When Claimant first met with Dr. Sudderth, he complained of frontal headaches, difficulty breathing through his nose, memory loss, loss of sense of smell, loss of sense of taste, and back pain. He also complained of blurred vision, a burning sensation in his nose, that he would get weak when he walked past his stove, and occasional disorientation as to time and place. He was taking Neurontin, Celexa, and Celebrex which he reported made him sleepy, but he would still wake up with headaches. (Tr. 186; CX-4, p. 175). Claimant was referred to Dr. Sudderth by his attorney. (Tr. 187). Claimant's attorney is a friend of Dr. Sudderth. (Tr. 188). Claimant told Dr. Sudderth that Dr. Atkins recommended he see a physician to evaluate his back pain and blood pressure. (Tr. 187-188).

Dr. Sudderth performed a physical examination of Claimant on April 4, 2002. (Tr. 188). Dr. Sudderth's initial impression of Claimant's condition following his physical examination was that he suffered a blunt trauma to his face, a fractured nose, headaches, a lumbosacral sprain, memory loss and confusion, and visual disturbance as a result of his accident. Dr. Sudderth suggested Claimant continue to take his medications, prescribed physical therapy for his back, and ordered x-rays and lab work. (Tr. 189). Dr. Sudderth also referred Claimant to an ophthalmologist and requested that he return to him for a follow-up appointment in two (2) weeks. (Tr. 189-190).

Claimant reported that physical therapy was improving his condition. He also reported that he did not want to take his "narcotic pain medicines." Dr. Sudderth noted that Claimant's physical therapy appeared to reduce his pain. Therefore, in lieu of narcotic medications, Dr. Sudderth prescribed physical therapy, Soma, Celebrex, and Ibuprofen for Claimant. (Tr. 190). Initially, Dr. Sudderth ordered a blood count, urinalysis, and chest x-ray after which he ordered a MRI of Claimant's lumbar spine. (Tr. 191). He indicated that he was aware that Dr. Atkins had requested a MRI, but that Employer/Carrier had refused authorization for the MRI. (Tr. 191-192). He also indicated that he sent copies of his findings and treatment plans regarding Claimant to Employer/Carrier up to Claimant's last appointment with him. He last saw Claimant on August 25, 2005. (Tr. 192).

His office was destroyed by a tornado sometime after Claimant's last appointment with him. He lost all of his patient records as well as his patients as a result of the destruction of his office. He indicated that he did not note any signs of malingering during his examinations of Claimant. He also indicated that Claimant consistently complained of back pain and headaches throughout his treatment with him. (Tr. 193-194). He further indicated that he was aware that Claimant was receiving treatment for post-traumatic stress disorder and suffered from blackouts. He could not recall any information to indicate Claimant being treated for seizures. (Tr. 194). He also could not recall discussing Claimant's medications with him to ensure that there was not any contraindication to any of his medications. (Tr. 195).

Dr. Sudderth described Vicodin as a very strong narcotic analgesic and Vioxx as a non-steroidal anti-inflammatory medication. (Tr. 195-196). He opined that a person taking Vicodin and Vioxx would have a lessening of symptoms in their

lumbar spine. (Tr. 196). He also opined that a person with a back injury taking those sorts of medications and living a sedentary lifestyle who then stopped taking the medications for a functional capacity evaluation, would experience back pain during such an evaluation. (Tr. 196-197). He noted that Claimant reported to him that he fell twenty (20) feet and reported to another physician that he fell twenty-five (25) feet. He also noted that Claimant having suffered black eyes following such a fall was indicative of an internal skull fracture. (Tr. 197). He further noted that the severity of damage to Claimant's nose from his fall was consistent with severe trauma. He did not know how Claimant could have fallen twenty (20) feet onto a steel platform and not have experienced serious injuries. (Tr. 197-198).

Dr. Sudderth noted that there was a mention of Claimant suffering a skull fracture in his medical records from the VA. He indicated that there was nothing in Dr. Mathai's records that were inconsistent with his findings. During his first examination of Claimant, Claimant had positive straight leg raising which was consistent with radiculopathy, but he noted he nevertheless wanted to see a MRI which was never performed. (Tr. 198). He concurred with Dr. Mathai's findings that from a physical limitation standpoint, Claimant was not a candidate for work involving prolonged walking, standing, bending, carrying, and heavy lifting. He also concurred with Dr. Mathai's opinion that Claimant could perform light duty. (Tr. 199; CX-7, p. 4).

Dr. Sudderth acknowledged that he reviewed the surveillance video showing Claimant working at a seafood market. (Tr. 199). He indicated that there was nothing in the video that was inconsistent with his evaluation of Claimant. (Tr. 199-200). He did not find Claimant's bending and stooping during his work at the seafood market excessive. He determined the physical activities performed by Claimant in the video were consistent with his complaints of pain. He noted that in the video Claimant can be seen wearing a soft lumbosacral support. (Tr. 200).

Dr. Sudderth concluded in reasonable medical certainty that Claimant's back pain was causally related to his accident. (Tr. 201-202). He based his conclusions on Claimant's claim that he experienced back pain when he returned to work for approximately two (2) weeks after his accident and that his back pain worsened after he discontinued his pain medication for his functional capacity evaluation. (Tr. 200-202). He noted that Dr. Atkins is the type of specialist one would see for headaches. (Tr.

202). He also noted that there was nothing in the records of Drs. Atkins, Kimble, and Ciota or the records from the VA that would cause him to change his opinions regarding Claimant's condition. (Tr. 202-203). However, he was surprised to see Claimant's accident described as a minor incident by Dr. Ciota. He found the records of Drs. Atkins and Kimble to be consistent with his own records and consistent with treatment for injuries sustained in a twenty (20) foot fall. (Tr. 203-204). Dr. Sudderth found nothing in Dr. Atkins's records to suggest Dr. Atkins undertook an examination of Claimant's back. Dr. Sudderth opined that perhaps Dr. Atkins left an examination of Claimant's back up to him. (Tr. 204). He indicated he billed Employer/Carrier for his care of Claimant and expressed certainty that there is still a balance owing. (Tr. 205).

On cross-examination, Dr. Sudderth denied that Claimant's attorney referred "many" patients to him for "legal cases." (Tr. 205). In the past five (5) years, Dr. Sudderth estimated Claimant's attorney referred three (3) or four (4) patients a year to him. He confirmed that Claimant's attorney referred Claimant to him. He also confirmed that he did not obtain x-rays, MRI films, or CT Scans of Claimant's back. (Tr. 206-207). He acknowledged that his opinions regarding Claimant's condition were based on his examination, Claimant's description of his accident, the symptoms reported to him by Claimant, and his review of Claimant's medical records. (Tr. 207).

The objective evidence reviewed by Dr. Sudderth concerning Claimant's back pain was a diagnostic film obtained by another physician that indicated Claimant had an L-4 radiculopathy. (Tr. 207-208). According to Dr. Sudderth, radiculopathy is an inflammatory reaction of a spinal cord root with a nerve that comes out of the spinal cord. He acknowledged that radiculopathy cannot be diagnosed based on diagnostic films alone; rather, it is based on personal history, physical examination, diagnostic films, and laboratory work. (Tr. 208). Dr. Sudderth indicated he tried to obtain a MRI of Claimant's back on several occasions, but on each occasion Employer/Carrier refused to pay for the procedure. (Tr. 208-209).

He concluded Claimant suffered from radiculopathy as Claimant complained of pain running down his legs, had pain to palpation, stress pain, and positive straight leg raising on his left side in addition to reports that he couldn't lift anything, care for himself, walk, sit, stand, or sleep and that he also did not have any sex life, social life, and no traveling ability. (Tr. 209-210). Dr. Sudderth confirmed he relied on

Claimant's complaints of pain to conclude that he suffered from pain to palpation. (Tr. 210). He indicated that in concluding Claimant suffered from positive straight leg raising at eighty (80) degrees on his left side he relied on Claimant's complaints of pain as well as his findings that Claimant consistently complained of pain when his leg was raised to a particular degree. (Tr. 210-211). There were no other objective medical findings that Dr. Sudderth reviewed regarding Claimant's back pain. (Tr. 211).

He confirmed that a person who falls and hurts his back would normally experience back pain within three (3) months. (Tr. 211-212). He also confirmed that although he noted Claimant suffered a skull fracture in his accident, he did not see any diagnostic films that indicated Claimant suffered such a fracture. He further confirmed that he made no note in his records of Claimant suffering from any psychological disorder. (Tr. 212). He indicated, however, that he determined Claimant suffered from some sort of psychological disorder as he came to some appointments inappropriately dressed. (Tr. 212-213). On one occasion he came dressed in military fatigues and on another occasion he showed up "super dressed up." Dr. Sudderth concluded Claimant's problems were attributable to his post-traumatic stress disorder for which he had told Dr. Sudderth he was being treated at the VA Hospital. (Tr. 213).

Dr. Sudderth confirmed that on July 10, 2003, he concluded Claimant was to refrain from working and that he was of the opinion that Claimant could not perform strenuous manual labor. (Tr. 213-214; CX-4, p. 90). On re-direct examination, Dr. Sudderth indicated he saw nothing on the surveillance video other than Claimant lifting a basket of shrimp that resembled strenuous manual labor. (Tr. 214-215).

**John R. Macgregor, M.D.**

John R. Macgregor, M.D. testified by deposition on August 1, 2006. Dr. Macgregor specializes in psychiatry and psychoanalysis. He is not board-certified in psychiatry, but is board eligible. He took the board exam, but did not complete a portion of the exam "to satisfaction." As such, he is eligible to take "it again" when he is "ready." (EX-20, p. 5). Claimant was referred to Dr. Macgregor by his attorney. (EX-20, p. 6).

Dr. Macgregor first met with Claimant on April 10, 2006. (EX-20, p. 6) He had two (2) additional meetings with Claimant on April 20 and April 26, 2006. (EX-20, pp. 6-7). Dr. Macgregor's April 10 and April 26, 2006 consultations with Claimant lasted approximately fifty-five (55) minutes, while his April 20, 2006 consultation lasted approximately thirty (30) minutes. (EX-20, p. 7; CX-8, p. 1). He did not administer any written tests during his consultations with Claimant. (EX-20, p. 7; CX-8, p. 2). Instead, he conducted a mental status examination and asked Claimant to complete "mathematical tests." In conducting his examination of Claimant, Dr. Macgregor was testing for memory loss. He asked Claimant to try to remember three (3) items, which Claimant had difficulty doing. He also asked him to perform a standard serial sevens test where Claimant was asked to subtract seven (7) from one-hundred (100) and to subtract seven (7) from the resulting number and to continue to do so with each resulting number. (EX-20, p. 7). Claimant had great difficulty performing the standard serial sevens test and eventually lost his place altogether, indicating Claimant suffered from recent memory loss. (EX-20, pp. 7-8).

According to Dr. Macgregor, the mental status examination was the general objective part of his examination of Claimant, while the personal history was the subjective part of his evaluation. Dr. Macgregor characterized the mental status examination as objective because the focus of the examination is the psychiatrist's observations of the patient. (EX-20, p. 8).

A mental status examination consists of six (6) sections, specifically, the patient's physical appearance, the way the patient relates to the examiner, the patient's intellectual functioning, the status of the patient's sensorium, the patient's emotional manifestations, and the patient's thought processes. (EX-20, p. 9). During his mental status examination of Claimant, Dr. Macgregor first observed Claimant's physical appearance. (EX-20, pp. 8-9). Claimant appeared "as a tall, muscular, neatly-dressed and well-groomed black male sporting a Panama hat" who looked "at least five years younger than his stated age." For his third appointment, however, Claimant appeared dressed in his army combat uniform. Dr. Macgregor found Claimant candid, cooperative, and highly motivated for psychiatric treatment. Claimant showed no gross intellectual deficits and his sensorium was clear and alert. He was oriented to time, place, person, and situation. He showed no gross or overt signs of delirium or dementia. His remote memory functions were intact, but his recent memory was "spotty." He

appeared more depressed than anxious, but his thought processes were coherent. He exhibited "no looseness of associations, clinical autism, psychotic ambivalence, [or] flight of ideas or delusions." (CX-8, p. 2).

Dr. Macgregor used Claimant's subjective history in order to determine if his psychiatric condition worsened after his accident. In utilizing Claimant's subjective history, Dr. Macgregor acknowledged he had to rely on Claimant's truthfulness in reporting his personal history. (EX-20, p. 9). Claimant reported to Dr. Macgregor that he suffered a fractured skull, broken nose, dizziness, periods of confusion and memory loss, and impaired cognition and seizures as a result of his accident. (EX-20, p. 10; CX-8, p. 1). He also reported that his depression and post-traumatic stress disorder, particularly his nightmares, intrusive thoughts and psychic numbing, became markedly worse after his accident. (EX-20, pp. 10-11; CX-8, p. 1).

Claimant additionally reported that he suffered from depressive moods, pent-up anger, irritability, strained interpersonal relationships, verbal temper outbursts bordering on becoming physical toward people, verbal temper outbursts where he kicked inanimate objects, markedly lower frustration tolerance, decreased libido, nocturnal insomnia, daytime drowsiness, loss of interest in previously enjoyed activities, relative social isolation and withdrawal, easy fatigability, lack of energy, shortened attention span, impaired concentration, forgetfulness, lowered self-esteem and self-confidence, hypersensitivity to feelings of guilt, anorexia, in addition to episodic feelings of hopelessness, helplessness, apathy as well as an inability to take pleasure in anything or motivating himself to do anything as a result of his accident. (EX-20, pp. 11-12; CX-8, pp. 1-2). Claimant also reported recurring suicidal and homicidal ideations, including visual and auditory hallucinations telling him to kill himself and others in addition to periodic anxiety and generalized nervous tension. (EX-20, p. 12; CX-8, p. 2). In addition, Claimant reported that he developed headaches, memory problems, and blurred vision after his accident. (EX-20, pp. 22-23; CX-12, p. 9).

According to Dr. Macgregor, Claimant claimed to suffer from some of his reported symptoms prior to his accident, but complained that they became worse after his accident. (EX-20, pp. 12-13). Dr. Macgregor confirmed that in order to determine whether Claimant's reported symptoms worsened after his accident he had to rely on Claimant's truthfulness in reporting his

symptoms in addition to his medical records. (EX-20, p. 13). He also confirmed that he relied on Claimant's truthfulness in reporting his symptoms in concluding that his psychiatric condition had worsened following his accident. (EX-20, pp. 13-14).

In evaluating Claimant, Dr. Macgregor did not review any records regarding results of psychological testing. He also did not perform any psychological testing on Claimant. He did, however, recommend Claimant undergo psychological testing. (EX-20, p. 14). He indicated he "rarely" relies on neuropsychological testing when evaluating patients. (EX-20, p. 15). Dr. Macgregor did not personally review the neuropsychological testing performed by Dr. Ciota. Rather, he reviewed a summary of her report in Dr. Culver's report. (EX-20, p. 16; CX-12, p. 2). Dr. Macgregor indicated he took Dr. Ciota's diagnosis of malingering into consideration, but that without directly reviewing her report he was not too concerned about Claimant's truthfulness regarding his symptoms. (EX-20, p. 16).

He could not recall reviewing any functional capacity evaluations regarding Claimant. He indicated, however, that he would not question Claimant's credibility based on findings of functional capacity evaluations that concluded Claimant was self-limiting and magnifying his symptoms. (EX-20, p. 16). Instead, he indicated that such findings tended to aggravate him since in his thirty-two (32) years of practice he has only seen functional capacity evaluation reports with those findings. (EX-20, pp. 16-17). In all his years of practice, he has never reviewed a functional capacity evaluation that indicated a patient tried his best or did his best. (EX-20, p. 17).

In a report dated June 12, 2006, Dr. Macgregor concluded Claimant's psychiatric condition had worsened following his accident as he developed visual and auditory hallucinations with suicidal and homicidal content. (EX-20, pp. 17-18; CX-12, p. 8). However, Dr. Macgregor indicated that after he prepared his June 12, 2006 report, he learned that Claimant had suffered from at least auditory hallucinations prior to his accident. (EX-20, pp. 18-19). He noted that in Claimant's VA records there was a mention of an incident prior to his accident where his wife overheard him talking to someone in the bathroom. (EX-20, pp. 19-20). Although Claimant suffered from at least auditory hallucinations prior to his accident, Dr. Macgregor still believed Claimant's psychiatric condition had worsened after his accident as Claimant developed visual and auditory

hallucinations that told him to kill himself and others. (EX-20, p. 20; CX-12, p. 10). Dr. Macgregor acknowledged Claimant was diagnosed by the VA as suffering from post-traumatic stress disorder prior to his accident. (EX-20, pp. 19-20). Accordingly, Dr. Macgregor confirmed that it was not his opinion that Claimant's accident caused his post-traumatic stress disorder.<sup>3</sup> (EX-20, pp. 20-21).

Dr. Macgregor opined that Claimant's belief that he has a physical disability which prevents him from working is a main cause of his depression. (EX-20, pp. 14-15). He indicted that Claimant's psychiatric condition would benefit from Claimant being physically able to work. (EX-20, p. 15). Dr. Macgregor did not review the video surveillance of Claimant working at Merlin Adams Seafood. He was aware, however, from his review of Dr. Culver's records that Claimant was filmed working at a seafood company, but was not aware of how long Claimant worked for the company or for what reason he stopped working for the company. (EX-20, p. 17). Dr. Macgregor confirmed that prior to his accident, Claimant reported that he was working and believed as long as he could work things would go well for him. Claimant's belief caused Dr. Macgregor to conclude that prior to his accident work was a stabilizing influence on Claimant's psychiatric condition as working helped to keep Claimant's mind off his post-traumatic stress disorder symptoms. (EX-20, pp. 21, 26-27; CX-12, pp. 9-10). Since Dr. Macgregor was of the opinion that following his accident Claimant was physically unable to work, he determined Claimant's psychiatric condition worsened after the accident since he no could no longer benefit from the stabilizing influence of work. (EX-20, p. 21).

For future treatment of his psychiatric condition, Dr. Macgregor recommended Claimant participate in psychotherapy and take psychotropic medication. (EX-20, p. 23). Dr. Macgregor believes Claimant would benefit from psychotherapy as it would give him a platform from which to discuss his concerns and feelings and help him discover helpful coping mechanisms. (EX-20, pp. 23-24). He also believes Claimant would benefit from psychotherapy since such therapy includes desensitization procedures that would help him face his fears as well as

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<sup>3</sup> Dr. Macgregor diagnosed Claimant as suffering from major depressive disorder and post-traumatic stress disorder. Although Dr. Macgregor indicated Claimant's post-traumatic stress disorder was not caused by his accident, he indicated Claimant's major depressive disorder was directly caused by his accident. (CX-8, p. 3).

relaxation techniques that would help him cope with any anxiety. (EX-20, p. 24). Dr. Macgregor recommended Claimant begin to see him once a week or once every other week for psychotherapy with a possible increase in frequency in therapy visits depending on Claimant's response to therapy. (EX-20, pp. 24-25).

As for psychotropic medications, Dr. Macgregor recommended Claimant take anti-depressants and anti-anxiety pills. Dr. Macgregor noted Claimant had been prescribed Seraquil, which greatly helped improve his condition. (EX-20, p. 25). Dr. Macgregor acknowledged that Claimant has a history of non-compliance with his medication schedule, but suggested Claimant might be more compliant if he received some encouragement and assistance in understanding the benefits he experiences as a result of the medications. (EX-20, pp. 25-26). He noted that making a patient do something is rarely successful. (EX-20, p. 26).

On cross-examination, Dr. Macgregor indicated that Claimant's testimony that he ended his employment with Merlin Adams Seafood as the result of an altercation with the owner is consistent with problems faced by people working with depression and post-traumatic stress disorder symptoms similar to those exhibited by Claimant. (EX-20, pp. 27-28). Dr. Macgregor noted that in his April 27, 2006 report, he concluded Claimant would have difficulty working with others. (EX-20, p. 28; CX-8, p. 4). He also noted that individuals who suffer from serious psychiatric conditions do not perform well when they are tested for prolonged periods as those individuals are generally irritable and easily frustrated. (EX-20, pp. 28-29).

According to Dr. Macgregor, some of the findings of Claimant's functional capacity evaluations concerning "mood" and "attitude" might be the result of Claimant's psychiatric condition. Dr. Macgregor indicated that an examiner testing an individual for psychiatric problems, like Dr. Ciota's neuropsychiatric testing of Claimant, should be familiar with a patient's psychotherapy history as an understanding of such therapy might affect his or her ability to read the results of the tests. (EX-20, p. 29). He noted that a difficulty in working with patients with psychiatric disorders is that the patient has to want to work with the physician or examiner. If a patient is sent for testing and does not want to participate in the testing, the patient's disposition will affect his performance. (EX-20, p. 30).

**Nancy Favaloro, M.S., C.R.C.**

Nancy Favaloro, M.S., C.R.C., testified by deposition on July 31, 2006. Ms. Favaloro is a vocational rehabilitation counselor who possesses a Master of Science degree in rehabilitation counseling in addition to a certification in rehabilitation counseling and case management. (EX-21, p. 5). She has worked as a rehabilitation counselor for approximately twenty-five (25) years and is qualified as an expert in rehabilitation counseling in various courts in Louisiana. (EX-21, pp. 5-6). She was retained by Employer/Carrier to meet with Claimant for the purpose of providing a vocational assessment.<sup>4</sup> (EX-21, p. 6).

Ms. Favaloro met with Claimant on April 6, 2006. (EX-6, p. 1). In her meeting with Claimant, she obtained background information from Claimant, including his date of birth, military service, highest education level achieved, and employment history. (EX-21, pp. 6-7). She noted that at the time of Claimant's accident, he was working for Employer. Claimant worked as a welder for Employer for approximately twelve (12) years. During his employment with Employer, Claimant was not required to lift anything over fifty (50) pounds by himself. (EX-21, pp. 7-8). Rather, Claimant lifted "patches" weighing twenty-five (25) to thirty (30) pounds. Anything weighing more than thirty (30) pounds was lifted by two (2) or three (3) employees. Ms. Favaloro characterized Claimant's work for Employer as medium duty since his job required that he work at a maximum height of fifteen (15) feet and lift a maximum of fifty (50) pounds. (EX-21, p. 8).

Ms. Favaloro noted a few years prior to his interview with her but sometime after his accident, Claimant worked at a seafood company, Merlin Adams Seafood. At Merlin Adams Seafood, Claimant boiled crabs, cleaned fish, and performed other wholesale-type seafood place employment activities. Claimant's employment activities at Merlin Adams Seafood required him to bend, stoop, lift hampers full of shrimp, and clean fish. (EX-21, p. 9). He worked at Merlin Adams Seafood for approximately

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<sup>4</sup> Besides the vocational assessment provided by Ms. Favaloro the only other vocational evidence in the record is a vocational report from Ed Ryan submitted by Claimant. (CX-9, p. 1). Review of Mr. Ryan's report indicates the report is applicable to a claimant other than the Claimant. As the report is inapplicable to Claimant, it was not considered in the resolution of this claim.

four (4) months. He quit after his head and back started to hurt. According to Ms. Favaloro, Claimant never told her he had been fired from his employment with Merlin Adams Seafood because of any anger problems or conflicts with a supervisor. (EX-21, p. 10). Claimant mentioned, however, that he suffered from a mental or psychiatric condition, but did not indicate that the condition caused his employment with Merlin Adams Seafood to be terminated. (EX-21, pp. 10-11).

Ms. Favaloro reviewed Claimant's medical records from Drs. Atkins, Colvin, Sudderth, Kimble, Ciota, Macgregor, and Culver as well as records from Drs. Mason and Mathai which were included in Claimant's social security application. (EX-21, p. 11). She noted that in May 2002, Dr. Atkins recommended Claimant return to work at medium duty. (EX-21, pp. 11-12). She also noted that a functional capacity evaluation of Claimant in 2000 indicated Claimant could perform medium duty work. Ms. Favaloro additionally noted Dr. Kimble released Claimant to return to work. (EX-21, p. 12). Drs. Macgregor and Culver were among the physicians who addressed psychiatric limitations. (EX-21, pp. 12-13). Dr. Macgregor determined Claimant could not return to work, while Dr. Culver concluded Claimant is malingering and not psychiatrically disabled. (EX-21, p. 13). Ms. Favaloro surmised that since Claimant worked for four (4) months "post-accident" and quit for reasons unrelated to any psychiatric problems, Claimant is able to work despite any psychiatric condition from which he may suffer. (EX-21, pp. 13-14).

As part of her assessment of Claimant, Ms. Favaloro administered three (3) achievement tests to Claimant. Claimant's scores from the tests indicated Claimant possessed the ability to understand what he reads at a 6<sup>th</sup> grade level and possessed arithmetic skills equivalent to a 4<sup>th</sup> grade level. Besides administering achievement tests to Claimant, Ms. Favaloro also performed a labor market survey. (EX-21, p. 14). In her labor market survey, Ms. Favaloro identified nine (9) job openings near Claimant's residence that were also within his work restriction of medium duty and available as of April and July 2006. (EX-21, pp. 14-16; EX-6, pp. 5-6). The first job opening identified by Ms. Favaloro was an entry-level position of cashier in the parking garage of the Hilton Hotel on Poydras Street in New Orleans. (EX-21, pp. 15, 18). The position paid \$7.50 per hour, required lifting of less than ten (10) pounds, and permitted alternating postural positions. (EX-21, p. 15).

The second job opening identified was a position of toll collector for the Crescent City Connection. (EX-21, pp. 16, 18). This position paid \$1,372.00 to \$2,101.00 per month and required lifting of fifteen (15) pounds. (EX-21, p. 16).

The third job opening identified by Ms. Favaloro was an entry-level position of cashier with Safari Car Wash in Metairie, Louisiana. (EX-21, pp. 16, 18). This position paid \$7.00 per hour plus tips. (EX-21, p. 16). The position required one to sit inside the car wash to process payments from customers, occasional dusting and light cleaning of the lobby area, and taking inventory of products in the lobby area. (EX-21, pp. 17-18). According to Ms. Favaloro, Safari Car Wash also had a position of ticket-writer open. This position required standing or walking outside the car wash to greet customers and ask what type of wash they wanted. (EX-21, p. 17). The position paid \$7.00 per hour plus commission. (EX-6, p. 6). The fifth job opening identified was a parking lot cashier with the New South Parking System at the New Orleans International Airport. (EX-21, p. 18). This position paid \$8.00 to \$9.50 per hour and was a sedentary duty position. The position required administration of an honesty test, processing of payments from customers for parking fees, and occasional walking outside of the collection booth to write down a vehicle license plate. (EX-21, pp. 18-19).

The sixth job opening identified by Ms. Favaloro was a position of cashier with Central Parking at Canal Place in downtown New Orleans. (EX-21, p. 19). This position paid \$8.00 per hour, required lifting one (1) to five (5) pounds, and allowed for one to change postural positions during his shift. (EX-21, p. 19; EX-6, p. 6). The seventh job opening identified was an unarmed security guard with Gallagher Security in either Metairie or Jefferson, Louisiana. (EX-21, p. 19). This position paid a minimum of \$7.00 per hour, required completion of two (2) eight (8) hour training classes, and walking for approximately fifteen (15) minutes every hour or riding in a golf cart. (EX-21, pp. 19-20). The final job openings identified were an entry-level position of tool repairman with either Beerman Precision in Kenner, Louisiana or Industrial Welding Supply in Harvey, Louisiana. (EX-21, p. 20; EX-6, p. 6). The positions paid \$8.00 per hour, required one to train people to repair electrical tools, and required occasional lifting of twenty (20) to thirty (30) pounds. Ms. Favaloro indicated that she determined all the identified openings were appropriate for Claimant considering his education, experience, physical limitations, and abilities. She also indicated that

based on Claimant's medical records, his vocational testing results, and her interview with him, Claimant could return to his pre-accident employment and not suffer any loss of wage-earning capacity. (EX-21, pp. 20-21).

On cross-examination, Ms. Favaloro categorized the cashier position at the Hilton Hotel as sedentary, the toll collector position at the Crescent City Connection as light, the cashier position at Safari Carwash as sedentary, the ticket-writer position at Safari Carwash as light, the cashier position at New Orleans International Airport as sedentary, the cashier position at Canal Place as sedentary, the unarmed security guard position at Gallagher Security as light, and the tool repairman positions at Beerman Precision and Industrial Welding Supply as medium. (EX-21, pp. 22-23). Ms. Favaloro indicated that the lifting requirement of a toll collector at the Crescent City Connection of fifteen (15) pounds was "less than occasional" as she opined any lifting would most likely be at the beginning and ending of a shift. She also indicated she understood Claimant's physical restrictions to be medium duty, but that she looked at sedentary to light duty in the alternative as they are inclusive in medium duty. (EX-21, p. 23).

Had Ms. Favaloro assessed Claimant's physical restrictions as determined by Dr. Mathai, specifically, lifting twenty (20) pounds occasionally, lifting ten (10) pounds frequently, standing six (6) hours, sitting six (6) hours, no climbing, no crawling, and occasional balancing, kneeling, crouching, and stooping, she concluded only the tool repairman positions identified in her labor market survey would be outside those restrictions. (EX-21, pp. 23-24). Regarding a report prepared by Dr. Macgregor, however, Ms. Favaloro indicated that a person with a similar educational and employment background as Claimant who suffers from a marked limited ability to interact with the public and respond to supervisors, as well as a moderate limitation of his ability to concentrate, and a severe limitation to adapt to normal work-like settings would have difficulty succeeding at any employment. (EX-21, pp. 24-25). She also indicated in regard to a report prepared by Dr. Mason that a person similar to Claimant who suffers from a moderate ability to understand detailed instruction, moderate limitation on ability to make judgments on simple work-related decisions, a marked limitation on an ability to carry out detailed instructions, a moderate limitation on interacting with the public, a marked limitation on interacting with co-workers, and an extreme limitation to respond to work pressures of usual work

situations would have difficulty working. (EX-21, pp. 25-27). Ms. Favaloro noted, however, that Dr. Mason's prognosis regarding Claimant was guarded because of his non-compliance with treatment. (EX-21, pp. 26-27).

Ms. Favaloro reviewed Claimant's medical records from the Veterans Administration. (EX-21, p. 27). She found the records interesting in that they did not address "a lot" of work restrictions, but did periodically indicate Claimant was non-compliant with his medications. (EX-21, pp. 27-28). The records also indicated in May 1998 Claimant was diagnosed with post-traumatic stress disorder, depression, social isolation, irritability, and anger outbursts. Ms. Favaloro found it interesting that Claimant was employed when he complained of depression and being overwhelmed by life's problems. She opined that should Claimant comply with his medication schedule perhaps he would feel better. (EX-21, p. 28). Ms. Favaloro confirmed she lacked expertise to determine how well a person could improve on medication, but suggested improvement as a result of medication is possible for a person who is not taking his medication as prescribed. (EX-21, pp. 28-29). She also confirmed that she is not in a position to "pick and choose" between two different psychiatrists' opinions. (EX-21, p. 29). Upon review of her notes regarding Claimant's records from the Veterans Administration, Ms. Favaloro noted in October 2003 Claimant complained of considerable stress in his marriage and on the job which she understood to mean that Claimant was either working in 2003, or at least told someone at the Veterans Administration that he was working. (EX-21, pp. 29-30). Ms. Favaloro acknowledged that the records presented an inconsistency which should be deferred to the fact-finder. (EX-21, p. 30).

On re-direct examination, Ms. Favaloro reiterated that regardless of any psychiatric condition Claimant might suffer from, he was able to work post-accident for four (4) months at a seafood market with that psychiatric condition. (EX-21, pp. 33-34). She also confirmed that based on the information provided to her by Claimant, he did not leave his employment at the seafood market because of a psychiatric condition. (EX-21, p. 34). On re-cross examination, Ms. Favaloro indicated she knew Claimant worked at a seafood market because he told her he had. (EX-21, pp. 34-35). She also indicated she did not ask him if he left his employment at the seafood market due to any psychiatric condition since he told her he quit because his head and back started hurting. (EX-21, pp. 35-36).

## **The Evidence Regarding Prior Injury**

Claimant treated with a psychiatrist at the VA Hospital for approximately one and one-half (1½) years beginning in 1970. He was prescribed Valium and Librium for nervousness. (CX-5, p. 176). He did not receive any additional treatment from that time to September 21, 1998, when he underwent an examination for post-traumatic stress disorder and other mental disorders at the VA. (CX-5, pp. 175-176). On September 21, 1998, Claimant was examined by Lawrence Guidry, Ph.D., to determine if he suffered from post-traumatic stress disorder. (CX-5, p. 175). Dr. Guidry concluded Claimant suffered from a depressive disorder, but not post-traumatic stress disorder. (CX-5, p. 179).

On May 27, 1999, Claimant underwent an additional examination by Dr. Guidry to determine if he suffered from post-traumatic stress disorder. (CX-5, p. 186). Dr. Guidry determined Claimant suffered from a depressive disorder in addition to post-traumatic stress disorder. (CX-5, pp. 189-190). He noted that during his previous examination, Claimant was reticent to talk about Vietnam. (CX-5, p. 190). He opined that recent sessions with a counselor allowed Claimant to speak more freely about terrible things he experienced in Vietnam which caused him to exhibit symptomatology that he failed to exhibit in his prior examination. (CX-5, pp. 189-190).

On September 17, 2001, Claimant underwent a compensation and pension examination conducted by Michelle Hamilton, M.D. (CX-5, pp. 192, 196). The purpose of the examination was to determine if he should receive an increase in his VA disability compensation for his post-traumatic stress disorder. At the time of his examination, Claimant had a thirty percent (30%) disability rating for his service connected post-traumatic stress disorder. (CX-5, p. 192). Claimant reported during this examination that his post-traumatic stress disorder symptoms had worsened over the past two (2) years to the point that he was "disgusted." (CX-5, p. 196). Dr. Hamilton concluded Claimant suffered from a major depressive disorder in addition to chronic post-traumatic stress disorder. (CX-5, p. 195). Claimant's disability rating for his service connected post-traumatic stress disorder was increased to fifty percent (50%) after this examination. (CX-5, pp. 37, 41, 43).

## **The Medical Evidence**

### **West Jefferson Medical Center**

On December 28, 2001, Claimant received treatment at the Emergency Department of West Jefferson Medical Center. (Tr. 42; CX-3, p. 19). He was diagnosed as suffering from a nasal fracture and was instructed to see Dr. Kimble in two (2) to three (3) days. (CX-3, p. 19). On July 1 and 2, 2004, Claimant underwent a functional capacity evaluation at West Jefferson Medical Center upon request of Dr. Atkins. The evaluation was performed by Kellie H. Yenari, LOTR, CFCE. Ms. Yenari noted that due to a lack of full physical effort and significant symptom magnification by Claimant, she was only able to report Claimant's abilities as she was able to observe them. Ms. Yenari concluded Claimant was capable of performing at light duty. She noted he might be able to perform at a higher level, but because of numerous inconsistencies during his testing, she could not definitively say that he was able to work at any other level than light duty. She recommended Claimant undergo a neuropsychological evaluation to assess his chronic pain behavior in addition to his symptom magnification. (EX-7, p. 1).

In her functional capacity evaluation report, Ms. Yenari noted Claimant demonstrated sub-maximal effort, meaning that Claimant could physically do more at times than he demonstrated during his evaluation. She found Claimant's subjective reports of pain and associated limitations unreliable and inaccurate because of her objective findings which indicated Claimant did not put forth his full effort, magnified his symptoms, and exhibited inappropriate illness behavior. (EX-7, pp. 2, 15-23, 25). She noted that as to rehabilitation recommendations, Claimant was a potentially difficult rehabilitation candidate due to his lack of full effort and symptom magnification. (EX-7, p. 5).

### **Dr. Kimble/West Jefferson Physicians Center**

Claimant met with Dr. Kimble on January 21, 2002. (CX-3, pp. 16, 18). Dr. Kimble noted that Claimant reported that he fell off a ladder while working on a vessel on December 28, 2001. He suffered an immediate onset of pain as well as swelling and bleeding from his nose. Emergency Room personnel at West Jefferson Medical Center diagnosed him as suffering from a nasal fracture. Since he was diagnosed as suffering from a

nasal fracture, Claimant reported he has had increased difficulty breathing through his nose, especially the left side of his nose. (CX-3, p. 16).

Dr. Kimble examined Claimant and found Claimant to have a deviation of both his nasal septum and external nasal pyramid. He also found Claimant to have inferior turbinate hypertrophy as well as a reduction in his nasal airway. Dr. Kimble diagnosed Claimant as suffering from a nasal fracture with nasal septal deviation and inferior turbinate hypertrophy. He recommended Claimant undergo a nasal reconstruction with septoplasty and submucous resection of the inferior turbinates. (CX-3, p. 17). Claimant had a follow-up appointment with Dr. Kimble on January 24, 2002. Dr. Kimble again diagnosed Claimant as suffering from a nasal fracture with nasal septal deviation and inferior turbinate hypertrophy and recommended Claimant undergo a nasal reconstruction with septoplasty and submucous resection of the inferior turbinates. (CX-3, p. 15).

Dr. Kimble ordered an x-ray of Claimant's chest, which was obtained on January 24, 2002. The x-ray showed possible diffuse chronic lung changes with no evidence of active disease or acute pathology in Claimant's chest. (CX-3, p. 14). Claimant underwent nasal reconstruction with septoplasty and submucous resection of the inferior turbinates on January 25, 2002. After the surgery, Claimant was given a prescription for Vicodin and instructed to schedule a follow-up appointment. (CX-3, p. 13). Dr. Kimble saw Claimant for a follow-up appointment on January 31, 2002. Claimant complained of pain in his nose, blurred vision, pain in his gums, memory loss, and that his nose was stopped up. Dr. Kimble noted that Claimant attributed some of his complaints of pain to his head injury rather than to his nose surgery. Dr. Kimble recommended Claimant remain off-work for another week and suggested Claimant return for another follow-up appointment in a week. (CX-3, p. 4).

Claimant met with Dr. Kimble for a follow-up appointment on February 8, 2002. He complained of pain in his forehead, difficulty breathing through his nose, and that he just generally felt bad. He told Dr. Kimble that he did not see how he could return to work. Dr. Kimble recommended Claimant return for a follow-up appointment in a week. He also recommended Claimant remain off-work for another week, but noted that after that Claimant needed to consider light duty. (EX-15, p. 6).

On February 19, 2002, Dr. Kimble noted Claimant had made a full recovery from his nose surgery and was able to return to work. He further noted that Claimant complained of headaches and dizziness. He recommended Claimant see a neurologist for those complaints. He also recommended Claimant schedule a final follow-up appointment in a month. (CX-3, p. 3). Dr. Kimble met with Claimant again on March 14, 2002. Claimant complained of difficulty breathing through his nose and nasal congestion in addition to headaches for which he had recently undergone a CAT Scan. Dr. Kimble noted some crusted material in the interior of Claimant's nose which he removed using a Bayonet forcep. He also noted some mucoid material on the floor of Claimant's nose which he removed with a number ten (10) Frazier tip suction. He additionally noted mild turbinate hypertrophy. He recommended Claimant use Nasonex spray two (2) sprays in each nasal passageway once a day. He also recommended Claimant return for a follow-up appointment in a month. (CX-3, p. 1).

Dr. Kimble met with Claimant on April 15, 2002, for a follow-up appointment. Claimant complained of headaches in addition to a burning sensation in his nose. He reported that he was seeing Dr. Atkins for treatment of his headaches. Dr. Kimble determined Claimant reached maximum medical improvement as to his nose injury and recommended he be discharged from his care. He noted, however, that Claimant was welcome to return to see him as the situation arises. He also noted that he encouraged Claimant to continue to see Dr. Atkins for his headaches. (EX-15, p. 1).

**Dr. Atkins/New Orleans Headache and Neurology Clinic/Culicchia Neurological Clinic**

Claimant met with Dr. Atkins on March 1, 2002. He complained of headaches accompanied by sensitivity to light, noise, and irritability as well as a burning sensation in his nose and difficulty breathing when exposed to artificial heat. He reported that he had been having headaches since December 28, 2001, when he fell twenty (20) to twenty-five (25) feet while he was working. He could not recall whether he lost consciousness as a result of his fall. He reported that after his fall he went to West Jefferson Hospital where x-rays were taken. He additionally reported that he was having daily headaches for which he took either Vicodin or Advil both of which helped. (EX-14, p. 11). Dr. Atkins diagnosed Claimant as suffering from

a head injury and vascular headache. He prescribed Elavil and Vioxx for Claimant and requested a CAT Scan of Claimant's head. He recommended Claimant schedule a follow-up appointment in one and one-half (1½) to two (2) weeks. (EX-14, p. 12).

Dr. Atkins met with Claimant on March 15, 2002, for a follow-up appointment. Claimant continued to complain of headaches as well as burning sensation in his nose and difficulty breathing through his nose. He also complained of memory problems. Dr. Atkins recommended Claimant speak with Dr. Kimble about the burning sensation in his nose and his difficulty breathing. Claimant reported that Dr. Kimble released him to work, but that he felt he was unable to work. Dr. Atkins noted that Claimant was taking Vicodin and Vioxx on a daily basis and took his Elavil before bedtime. Claimant reported that he was sleepy during the day. Dr. Atkins diagnosed Claimant as suffering from a head injury, perivascular headache, and subjective memory loss. He switched Claimant from Elavil to Neurontin and recommended that he continue to take his Vioxx as instructed. He also encouraged Claimant to avoid taking Vicodin as it is habit forming. He recommended Claimant undergo a functional capacity evaluation in addition to a neuropsychiatric evaluation with Dr. Van Geffen. Claimant was advised to schedule a follow-up appointment in two (2) weeks. (EX-14, p. 10).

On March 27, 2002, Claimant met with Dr. Atkins for a follow-up appointment. Claimant reported that he started to experience back pain the week prior. He also reported that he was experiencing headaches at his temples and blurred vision. Dr. Atkins noted the results of Claimant's functional capacity evaluation indicated he could return to his previous employment. Claimant reported that the Neurontin he was taking was helping him, but he felt unable to return to work. He also reported lately feeling a bit down and depressed. Upon examination of Claimant, Dr. Atkins noted Claimant's optic disks were sharp, visual fields full, extraocular movements were full, and his lumbosacral spine was nontender. He also noted Claimant appeared a bit anxious and sweaty with cold and clammy hands. Dr. Atkins diagnosed Claimant as suffering from a head injury, vascular headache, back pain, and subjective memory disturbance. He recommended Claimant see a primary care physician to check his blood sugar and an ophthalmologist for an eye examination. He also changed Claimant's Neurontin prescription to six-hundred (600) milligrams at bedtime only and provided Claimant with

additional prescriptions for Celebrex and Celexa. He additionally consulted with a psychiatrist, Dr. Ameduri, for work hardening. (EX-14, p. 7). Claimant was instructed to schedule a follow-up appointment in two (2) to four (4) weeks. (EX-14, p. 8).

Dr. Atkins met with Claimant on May 3, 2002, for a follow-up appointment. Claimant complained of low back pain which Dr. Atkins noted he had complained about during his previous appointment, but not during his initial evaluation. He also noted Claimant's neuropsychiatric evaluation indicated he was malingering and his functional capacity evaluation showed varying levels of effort, but found he could return to medium duty. Claimant's previous employment was medium duty. Upon examination of Claimant, Dr. Atkins noted that at times Claimant appeared to exhibit exaggerated grimaces. Dr. Atkins diagnosed Claimant as suffering from a head injury with vascular headache and back pain. He recommended Claimant continue with his current medication and schedule a follow-up appointment in three (3) to four (4) weeks. He also requested an x-ray of Claimant's spine and noted that Claimant was able to return to his previous employment. (EX-14, p. 4). In addition, Dr. Atkins noted that since Claimant's last visit he had requested an x-ray of his spine and a MRI of his head. Neither of the procedures had been done. Dr. Atkins re-ordered an x-ray of Claimant's spine. (EX-14, p. 5).

Dr. Atkins again met with Claimant on May 26, 2004. Claimant reported he has suffered from headaches and back pain since December 28, 2001, when he fell off a ladder while working on a vessel. Dr. Atkins noted Claimant also reported that he suffered a brief loss of consciousness as a result of his fall. To the best Dr. Atkins' recollection, a CAT Scan of Claimant's head showed no significant problems. He noted that Claimant was treated with medication for his injuries without much improvement. A functional capacity evaluation indicated Claimant could return to his previous employment and a neuropsychological evaluation indicated Claimant was malingering. Dr. Atkins' noted Claimant did not return to work. Claimant reported that his life was ruined and that he has just been suffering. (EX-14, p. 1).

Claimant complained of daily headaches and back pain. (EX-14, p. 1). He reported that his headaches would come and go and made him sick to his stomach. He also reported that his headaches caused him to be sensitive to light and noise. Claimant mentioned he considered suicide, but denied having a

plan to commit suicide. Dr. Atkins noted Claimant tended to ramble. He also noted Claimant was on an extensive amount of medication, including Celebrex, Soma, Prazosin, Seroquel, Topiramate, Trazodone, Nefazodone, Lamotrigine, and Vicodin. Claimant reported his medication caused him to itch a bit. Upon examination, Dr. Atkins noted Claimant grimaced when he touched his back "most gently." He also noted Claimant expressed the same grimace when he performed a strength exam on his upper extremities. Dr. Atkins additionally noted Claimant continuously offered unsolicited information during his exam, such as, he wasn't faking and that it was a game. (EX-14, p. 2).

Dr. Atkins diagnosed Claimant as suffering from headache and back pain. He noted that he needed to review Claimant's medical records from New Orleans Headache and Neurology Clinic, the VA, and Dr. Sudderth. He planned on checking with Claimant's workers' compensation carrier to see if a MRI of Claimant's head could be ordered, or if one had recently been ordered. (EX-14, p. 2). He recommended Claimant be referred to a pain management physician. Dr. Atkins noted that he was pessimistic that Claimant's symptoms would quickly resolve, noting again that a functional capacity evaluation done several years prior indicated Claimant could return to his previous employment and that a neuropsychiatric evaluation indicated he was malingering. (EX-14, p. 3).

### **Diagnostic Imaging Services**

Claimant underwent a CAT Scan of his head on March 6, 2002, upon request of Dr. Atkins. (EX-12, p. 1). The CAT Scan revealed normal ventricles, no midline shift, no mass effects or focal areas suggesting hemorrhage or edema change. Physiological appearing calcification was noted, however, in the area of pineal gland and choroids plexus. (EX-9, p. 6; EX-12, p. 1).

### **Crescent City Physical Therapy**

Claimant underwent a functional capacity evaluation on March 21 and 22, 2002, upon request of Dr. Atkins. Gavin Matthews, P.T., conducted the evaluation. Mr. Matthews found Claimant did not give his maximum effort and self-limited. (EX-8, pp. 1-2). He also found Claimant exhibited a slow and cautious gait pattern during his therapy session, but exhibited a faster normal pattern when he entered and exited the clinic. (EX-8, p. 3). Mr. Matthews concluded Claimant could perform

medium duty, which was consistent with the requirements of his previous employment. (EX-8, pp. 1, 3). He listed Claimant's work restrictions from frequent elevated work, occasional forward bend sitting and standing, continuous alternating between sitting and standing, continuous crawling, kneeling, crouching, repetitive squatting, sitting, standing, walking, stair climbing, step ladder climbing, balancing, and coordination of left and right upper extremities. (EX-8, p. 4).

**Megan A. Ciota, Ph.D.**

Dr. Ciota met with Claimant on March 25, 26, and 28, 2002, for a neuropsychological evaluation upon request of Dr. Atkins. (EX-9, pp. 1, 3). Claimant reported he suffered two (2) chipped bones in his face after he fell from a twenty (20) to twenty-five (25) foot ladder while working on December 28, 2001. He also "spontaneously" reported suffering from difficulty breathing, blurred vision, memory problems, irritability, a burning sensation in his nose especially when exposed to heat, nightmares about dead people, pain across his forehead, tightness across the bridge of his nose, and a persistent dry cough since his December 2001 accident. He additionally reported that he also suffered from back pain which developed two (2) weeks prior to his appointment with Dr. Ciota. He further reported since his accident he has suffered from impaired concentration, a worsening stutter, and a decrease in sense of taste and smell. (EX-9, p. 5).

Dr. Ciota noted Claimant reported no history of problems with mood or mental disorders. She also noted that he reported being examined for problems related to exposure to Agent Orange, but denied suffering from any complications from such exposure. (EX-9, p. 5). After interviewing Claimant and administering several tests to determine whether Claimant suffered from neuropsychological deficit and sparing, Dr. Ciota concluded Claimant was malingering and recommended he be encouraged to return to work. (EX-9, pp. 1-3, 9).

**Dr. Sudderth**

Claimant met with Dr. Sudderth on April 4, 2002. (CX-4, pp. 175, 186). He told Dr. Sudderth that he injured his forehead and nose and suffered "bilateral blackouts" when he fell twenty (20) feet off a ladder while working on a vessel on December 28, 2001. (CX-4, p. 175). Upon physical examination, Dr. Sudderth noted Claimant's nose was slightly flat and deviated to the right side, no motor or sensory loss,

lumbosacral pain to palpation with a decreased range of motion, leg raising positive sign on the left at eighty degrees (80°), and stress pain with flexion of his lumbosacral spine at ninety degrees (90°), extension at twenty degrees (20°), and lateral flexion at twenty degrees (20°) on his right and thirty degrees (30°) on his left. (CX-4, pp. 175-176). He diagnosed Claimant as suffering from blunt trauma to his face and nose, headaches, lumbosacral sprain, memory loss and confusion, and visual disturbance all secondary to his December 2001 accident. He recommended Claimant continue his current medications as prescribed by Dr. Atkins and prescribed physical therapy for his lumbosacral area. (CX-4, p. 176).

Claimant met with Dr. Sudderth for an appointment approximately every two (2) weeks from April 18, 2002 to July 29, 2004. (CX-4, pp. 4-5, 7-8, 10-11, 13, 17-18, 21, 23, 28-29, 32, 34, 36, 38-39, 41, 43, 45, 47, 49, 51, 53, 56, 58, 60, 62, 64-65, 68, 70, 72, 74, 76-77, 80, 82, 85, 87, 90-91, 94-95, 98, 101-102, 105-106, 109-110, 113-114, 117, 127, 130-131, 134-135, 138). At each appointment Claimant complained of headaches and back pain. On each occasion, Dr. Sudderth diagnosed him as suffering from lumbosacral pain secondary to his December 28, 2001 accident and recommended Claimant continue taking his current medications, continue attending physical therapy, and return in two (2) weeks for a follow-up appointment. He also recommended Claimant refrain from work, provided Claimant with a soft lower back brace, and noted that he needed a MRI. (CX-4, pp. 4-5, 7-8, 10-11, 17, 21, 28, 32, 36, 39, 43, 47, 51, 56, 60, 64, 68, 72, 76, 80, 85, 90, 98, 102, 106, 110, 114, 119, 127, 131, 135, 139, 143, 147, 152, 157, 161, 164, 168, 172).

During his June 4, 2004 follow-up appointment with Claimant, Dr. Sudderth noted Claimant had seen Dr. Atkins on May 26, 2004. He also noted Claimant told him Employer/Carrier refused to authorize a MRI. (CX-4, p. 10). At Claimant's June 17, 2004 follow-up appointment, Dr. Sudderth noted Claimant told him he was no longer seeing Dr. Atkins and that Employer/Carrier continued to refuse to authorize a MRI. (CX-4, p. 8). During Claimant's July 15, 2004 follow-up appointment, Dr. Sudderth noted he had received and reviewed Dr. Colvin's report. He also noted that MRI results were not yet available. (CX-4, p. 5).

#### **Westbank Medical Clinic**

Claimant underwent a chest x-ray on November 23, 2003, upon request of Dr. Sudderth. The x-ray showed no focal pulmonary or plural lesions. No effusions were visualized and there were no

acute osseous abnormalities noted. However, mild prominence of the pulmonary interstitium suggesting mild underlying fibrosis was noted. (CX-4, p. 55). Claimant also participated in physical therapy at Westbank Medical Clinic from approximately September 18, 2003 to April 1, 2004, upon request of Dr. Sudderth. (CX-4, pp. 217-219). Claimant's physical therapist noted that Claimant continued to complain of back pain throughout his physical therapy. (CX-4, pp. 187-219).

#### **MRI of Louisiana**

Claimant underwent a MRI of his brain on June 29, 2004, upon request of Dr. Atkins. The MRI revealed Claimant's brain parenchyma had normal volume and signal intensity. It also revealed no extra-axial fluid collections or intracranial mass, mass effect, or hemorrhage. Inflammatory changes in Claimant's paranasal sinuses, particularly his right maxillary and left frontal sinus were noted. However, no significant intracranial abnormality was evident. (EX-11, p. 1).

#### **Dr. Colvin/Culicchia Neurological Clinic**

Claimant met with Dr. Colvin on July 9, 2004. Dr. Colvin noted Claimant was angry because he did not know why he needed to met with her. He told Dr. Colvin he broke his nose and has suffered neck and back pain when he injured himself while working in 2001 at the Huey Long Bridge. Claimant was reluctant to inform Dr. Colvin of his past medical history except for his treatment for post-traumatic stress disorder. (EX-10, p. 1). Dr. Colvin diagnosed Claimant as suffering from some chronic headache and neck pain with large psychological overlay, particularly from his post-traumatic stress disorder. She recommended Claimant use Lidoderm patches, if available. Otherwise, she recommended Claimant continue to use his current medications and avoid narcotics. Claimant informed Dr. Colvin he did not want any follow-up appointments with her that he would rather continue to see Dr. Atkins. (EX-10, p. 3).

#### **Dr. Helen Mason**

Claimant met with Dr. Mason on August 12, 2004, upon referral from the Social Security Administration. His appointment with Dr. Mason lasted approximately thirty-five (35) minutes. Claimant complained of having an obsession with death, nightmares, memory problems, problems sleeping, depression, crying fits, homicidal thoughts, and a hair trigger temper. He also complained of being isolated from other people and

mentioned that he sometimes drives on the wrong side of the road. He told Dr. Mason he began to experience post-traumatic stress disorder symptoms "right after" his service in Vietnam. He also told Dr. Mason that he suffered a back injury, fractured skull, and broken nose when he fell from a twenty (20) foot ladder while working on a vessel on December 28, 2001. According to Claimant, he began to experience "full blown" post-traumatic stress disorder after his December 2001 accident. Dr. Mason noted Claimant was regularly receiving treatment from the VA Hospital for his post-traumatic stress disorder following his accident. (CX-6, p. 1).

Claimant appeared at his appointment with Dr. Mason dressed in a camouflage outfit and boots. Dr. Mason noted Claimant was cooperative and his speech was spontaneous, logical, coherent, and relevant. She found Claimant to suffer from auditory hallucinations that told him to harm himself or others, homicidal thoughts, suicidal thoughts, and trouble controlling his anger. She diagnosed him as suffering from post-traumatic stress disorder and noted that he had a history of non-compliance with his treatment. (CX-6, p. 2). She also noted that her prognosis of Claimant was guarded because of his non-compliance with his treatment and the chronicity of his illness. (CX-6, p. 3). She additionally noted Claimant's psychiatric condition affected his ability to understand, remember, and carry out instructions as well as his ability to respond appropriately to supervisors, co-workers, and work pressures. (CX-6, pp. 4-5).

#### **Dr. Mary Mathai**

Dr. Mathai met with Claimant on August 24, 2004, upon request of the Social Security Administration. Claimant reported he suffered skull and back injuries on December 28, 2001, when he fell twenty (20) feet off a ladder while he was working. He complained of severe lower back pain, aching pain in his right thigh, numbness in his right thigh, weakness in his leg muscles, numbness in his feet, problems sleeping, neck pain, pain and numbness in his left hand, weakness in his right hand, cramps in his right triceps, headaches, dizziness, nausea, blurred vision, and pain and swelling in his right knee. According to Claimant, he experiences back pain when he coughs, sneezes, and engages in sexual relations. His back pain worsens with sitting, standing, lying down, bending, and lifting. (CX-7, p. 1). Claimant reported he could sit for ten (10) minutes

at a time and stand five (5) minutes at a time without problems. He also reported that he required assistance in lifting anything heavier than five (5) pounds. (CX-7, p. 2).

Upon examination, Dr. Mathai noted Claimant had 20/40 vision in his right eye and 20/30 vision in his left eye and that he did not wear glasses. She also noted Claimant's sitting posture was normal, his cervical spine range of motion was normal, and that he exhibited full range of motion and muscle strength in his hips, knees, and ankles. However, Claimant exhibited poor effort in muscle strength checking with grip. (CX-7, p. 2). He had straight leg raising to fifteen degrees (15°) on his right and twenty degrees (20°) on his left. His range of motion of his thoracic and lumbosacral spine was normal in flexion to ninety degrees (90°), extension to thirty degrees (30°), lateral flexion to zero degrees (0°) on his right, lateral flexion to five degrees (5°) on his left, and rotation of thirty degrees (30°) bilaterally. (CX-7, p. 3).

An x-ray of Claimant's back obtained on August 24, 2004, upon request of Dr. Mathai revealed mild narrowing of Claimant's L4-5 disc space. Minimal osteophyte formation was also noted off the adjoining endplates at the L4-5 and L1-2 levels. (CX-7, pp. 3, 5). Claimant was found to suffer from degenerative disc disease with disc space narrowing at the L4-5 level. (CX-7, p. 5). Dr. Mathai concluded Claimant suffered from chronic lower back pain with probable bilateral L4 radiculopathy with absent knee reflexes, hypertension, and post-traumatic stress disorder. (CX-7, p. 3). She listed Claimant's work restrictions as no prolonged walking, standing, bending, carrying, and heavy lifting. (CX-7, pp. 4, 6-7, 9). She recommended Claimant perform light duty with frequent breaks. (CX-7, p. 4). Dr. Mathai also recommended Claimant obtain eyeglasses to correct his vision. (CX-7, p. 8). Dr. Mathai limited Claimant to lifting/carrying twenty (20) pounds occasionally and ten (10) pounds frequently and recommended he avoid crawling and climbing. (CX-10, p. 4).

### **The VA Hospital**

On September 30, 2002, Claimant underwent a compensation and pension examination conducted by Stephanie Repasky, Psy.D., a clinical psychologist. The purpose of the examination was to determine if he should receive an increase in his VA disability compensation for his post-traumatic stress disorder. At the time of his examination, Claimant had a fifty percent (50%)

disability rating for his service connected post-traumatic stress disorder. (CX-5, p. 43). Claimant reported increased difficulty with depression, intrusive thoughts, and irritability since January 2002. He also reported that he was not taking any psychiatric medications at that time. Claimant told Dr. Repasky that he suffers from blurred vision, memory problems, and headaches as a result of a fall off a ladder at work in December 2001. He reported that he felt he was unable to work. Dr. Repasky noted that since Claimant was able to work prior to his December 2001 accident and reported that he was unable to work because of physical injuries secondary to his accident, any change in his occupational functioning was consequent to his accident and accompanying physical problems rather than his post-traumatic stress disorder. (CX-5, p. 44).

Claimant reported that following his December 2001 accident, he began to experience an increase in intrusive thoughts about combat, mood swings, irritability, and combat-related nightmares. Dr. Repasky noted that while Claimant reported an increase in intrusive thoughts and combat-related nightmares, his score on a PCL-M examination was consistent with his score from his last compensation and pension examination. (CX-5, p. 45). Dr. Repasky opined that Claimant's reported physical problems and increased difficulties with mood, intrusive thoughts, and sleep following his December 2001 accident might be organic in nature, but noted that she could not definitively conclude that his symptoms were organic in nature without review of his medical records from non-VA physicians. (CX-5, pp. 45-46).

Dr. Repasky diagnosed Claimant as suffering from post-traumatic stress disorder. She concluded that while Claimant reported occupational impairments, any change in his occupational functioning was secondary to his "medical difficulties" from his December 2001 accident rather than his post-traumatic stress disorder. She also concluded that while Claimant appeared significantly impaired socially, there was no apparent change in his social functioning as his verbalizations and test scores were very similar to those obtained in his previous compensation and pension examination. She opined that Claimant's subjective complaints were secondary to the injuries he suffered in his work-related accident. (CX-5, p. 46).

Claimant's disability rating for his service connected post-traumatic stress disorder was not increased following this examination.<sup>5</sup> (CX-5, pp. 37, 41).

On December 16, 2003, Claimant underwent a MRI of his head without contrast followed by contrast. The MRI revealed bilateral maxillary and left sphenoid sinus disease. No focal parenchymal lesions were noted and no evidence of mass, mass effect, or intracranial hemorrhage was found. (EX-16, p. 15).

### **The Contentions of the Parties**

Claimant contends he suffered a fractured nose, head trauma, and back injury on December 28, 2001, when he fell at least twenty (20) feet from a ladder while working on a vessel. He maintains that his back injury was not discovered until his first functional capacity evaluation in March 2002. According to Claimant, his back pain was masked or disguised by his prescribed pain medication and sedentary lifestyle following his accident. Claimant concedes he reached maximum medical improvement as to his fractured nose in 2002. He argues, however, that he has not reached maximum medical improvement as to his head trauma or back injury.

According to Claimant, recent treatment with his neurologist, Dr. Atkins, on May 26, 2004, shows that he has not reached maximum medical improvement as to his head trauma. He further maintains that he has not reached maximum medical improvement as to his back injury as appropriate testing was not authorized by Employer/Carrier. He additionally maintains that his treatment with Dr. Sudderth for his back injury was obtained upon referral from his treating neurologist, Dr. Atkins, and, accordingly, is covered medical treatment under the Act.

Claimant also contends that his head trauma and back injury prevent him from returning to work. Prior to his accident, Claimant's pre-existing post-traumatic stress disorder was

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<sup>5</sup> Although Claimant's service connected disability rating was not increased following this compensation and pension examination, there is a notation in Claimant's VA records that indicates his "primary eligibility" as fifty percent (50%) to one-hundred percent (100%). (EX-16, pp. 25-26). There is also a notation in Claimant's VA records that indicates Claimant underwent another compensation and pension examination on April 14, 2004, though there is no report from such examination in the records. (EX-16, p. 32).

tempered by his ability to work. Since he is no longer physically able to work, he argues that his pre-existing post-traumatic stress disorder has been aggravated to such an extent that he is now totally disabled. Accordingly, he contends he is entitled to an award of temporary total disability compensation from December 28, 2001 to present and continuing as well as payment and reimbursement of the bills and expenses associated with the treatment provided by Drs. Sudderth and Macgregor.

Employer/Carrier contend Claimant's pre-existing post-traumatic stress disorder was not aggravated by his December 2001 accident as Claimant's records from the VA Hospital show Claimant suffered from symptoms prior to his accident that he claimed developed after his accident. Employer/Carrier further contend the opinion of Dr. Macgregor, the psychiatrist Claimant saw upon referral from his attorney, is incredible citing the following reasons: 1) Dr. Macgregor is not board certified; 2) Dr. Macgregor did not review any neuropsychological testing that had been performed on Claimant nor did he perform any neuropsychological testing; 3) Dr. Macgregor failed to review Claimant's functional capacity evaluations as well as surveillance video of Claimant working post-accident; 4) Dr. Macgregor's acknowledgement that the post-traumatic stress disorder symptoms Claimant claimed developed after his accident actually existed prior to his accident; 5) Dr. Macgregor's reliance on false or inaccurate information from Claimant regarding his condition; 6) Dr. Macgregor's determination that work was a stabilizing influence over Claimant's condition despite information in Claimant's VA Hospital records to the contrary; and 7) Dr. Macgregor's conclusion that Claimant is unable to work post-accident.

Employer/Carrier additionally contend that Claimant's allegation of an aggravation of his pre-existing post-traumatic stress disorder is suspect since Claimant did not allege an aggravation until June 17, 2005, several years after his December 28, 2001 accident. Employer/Carrier argue that Claimant's allegation of an aggravation of his pre-existing post-traumatic stress disorder is incredible as Claimant admittedly provided false information to his healthcare providers in order to obtain greater VA disability compensation. Employer/Carrier further argue Claimant's back injury is not causally related to his December 2001 accident as Claimant did not complain of back pain until approximately three (3) months after his accident. According to Employer/Carrier, Claimant complained of a sudden onset of low back pain the day before he reported for his first functional capacity evaluation in March

2002. Accordingly, Employer/Carrier maintain that Claimant's allegations that he injured his back on December 28, 2001, or during his functional capacity evaluation in March 2002 are completely false.

Employer/Carrier further maintain that Claimant's treatment with Drs. Sudderth and Macgregor was unauthorized as neither physician was Claimant's choice of physician, nor did Claimant seek authorization to treat with either physician. Employer/Carrier further maintain that Claimant has not sustained a loss in wage-earning capacity. Claimant was released to return to work by his treating neurologist in May 2002. A functional capacity evaluation performed in 2002 showed Claimant could return to work. Employer/Carrier's vocational rehabilitation counselor, Ms. Favaloro, concluded Claimant was able to perform medium duty and identified several job openings in Claimant's geographical area that paid up to \$2,100 per month. Ms. Favaloro also concluded Claimant could return to his previous employment as a welder and suffer no loss in wage-earning capacity. Ms. Favaloro further concluded that based on the surveillance video that showed Claimant working post-accident, Claimant was capable of working despite any alleged psychiatric problems. As such, Employer/Carrier maintain Claimant has suffered no loss in wage-earning capacity.

Employer/Carrier contend Claimant reached maximum medical improvement on April 15, 2002 as to his nose injury and on May 3, 2002 as to his head trauma and is, therefore, not entitled to any further disability compensation. Employer/Carrier further contend that should an aggravation of Claimant's pre-existing post-traumatic stress disorder be found, Section 8(f) applies and, accordingly, Employer/Carrier is entitled to Section 8(f) relief.

#### **IV. DISCUSSION**

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the

proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968). Any credibility determination must be rational, in accordance with the law, and supported by substantial evidence based on the record as a whole. Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. at 467; Mijangos v. Avondale Shipyards, Inc., 948 F. 2d 941, 945 (5<sup>th</sup> Cir. 1991); Huff v. Mike Fink Restaurant, Benson's Inc., 33 BRBS 179, 183 (1999).

It is also noted that the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 538 U.S. 822, 830, 123 S.Ct 1965, 1970 n. 3 (2003)(in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference)(citing, Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997)(an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 212, 216 (2d Cir. 1980)("opinions of treating physicians are entitled to considerable weight"); Loza v. Apfel, 219 F.3d 378 (5th Cir. 2000)(in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

In this case, I was impressed with the sincerity, testimony, and records of Dr. Culver, Ms. Michel, and Ms. Favaloro. I was not impressed, however, by the sincerity, testimony, and records of Drs. Sudderth and Macgregor. Dr. Sudderth concluded in reasonable medical certainty that Claimant's back pain was causally related to his December 28,

2001 accident. Nevertheless, he confirmed that a person who falls and hurts his back normally experiences back pain within three (3) months. He represented that he reviewed Claimant's medical records, the review of which helped form part of the basis of his conclusion. However, there is no indication or notation in Claimant's medical records that suggested Claimant complained of back pain prior to March 20, 2001, nearly three (3) months after his accident.

In addition, Dr. Sudderth stated throughout his treatment of Claimant that Claimant should refrain from work. Yet, he testified that Claimant could perform light duty and that nothing in the surveillance video that showed Claimant working at a seafood market was inconsistent with his finding. The surveillance video showed Claimant, among other things, lifting baskets full of shrimp that weighed approximately forty (40) to fifty (50) pounds. Clearly the lifting of such weight is contrary to a finding of light duty. I also find Dr. Sudderth's testimony that he lost all his patients' medical records in a tornado interesting in that despite his testimony, he was able to supply copies of Claimant's records.

In light of Dr. Sudderth's acknowledgment that a person who falls and hurts his back normally suffers back pain within three (3) months, I am unable to credit his conclusion regarding Claimant's back pain as Claimant, who alleges he suffered a back injury when he fell on December 28, 2001, did not complain of back pain until nearly three (3) months after his accident. I am also unable to credit Dr. Sudderth's conclusion as to Claimant's physical limitations. He consistently restricted Claimant from working, but then testified Claimant could perform light duty which he stated was consistent with the requirements of Claimant's employment at the seafood market despite Claimant's lifting of baskets full of shrimp that weighed forty (40) to fifty (50) pounds. Since I am unable to credit much of Dr. Sudderth's testimony and records, I accord little to no weight to his testimony and records.

I am also unable to credit much of the testimony and records of Dr. Macgregor. Dr. Macgregor concluded Claimant suffered from a major depressive disorder that was directly caused by his accident and post-traumatic stress disorder that was worsened by his accident. In forming his conclusion, Dr. Macgregor did not administer any written tests nor did he review any findings from psychological testing that had been performed on Claimant. Rather, he relied on Claimant's reported symptoms. The psychological testing performed on Claimant all found him to

be a malingerer. Considering the findings of those tests, I find Dr. Macgregor's conclusion regarding Claimant's psychiatric condition unreliable as the findings clearly indicate Claimant's reporting of his symptoms are not accurate. Therefore, I accord little to no weight to Dr. Macgregor's testimony and records.

Finally, I am unable to credit much of Claimant's testimony as I find his testimony riddled with contradictions, inconsistencies, inexplicable denials, and falsehoods. On direct examination, Claimant testified that he fractured his skull as a result of his December 28, 2001 accident. His testimony contradicts medical records from West Jefferson Medical Center as well as records from Drs. Kimble and Atkins. Claimant was treated at West Jefferson Medical Center and also treated with Drs. Kimble and Atkins shortly after his accident. None of these providers indicated Claimant suffered a skull fracture as a result of his accident and, notably, diagnostic films of Claimant's head obtained after his accident showed no evidence of a fractured skull.

Claimant also testified on direct examination that he began to experience back pain during his March 2002 functional capacity evaluation. His testimony contradicts the functional capacity evaluation report which indicated he reported experiencing an episode of low back pain the day prior to his first appointment with the evaluator. His testimony is also inconsistent with his later testimony on cross-examination wherein he testified he had experienced back pain prior to, during, and after his functional capacity evaluation. During cross-examination, Claimant also denied stating during the second day of testing for his functional capacity evaluation that his back pain had lessened.

On direct examination, Claimant additionally testified that Dr. Atkins recommended he see another physician regarding his back pain. His testimony, however, contradicts Dr. Atkins' records which showed that Dr. Atkins requested an x-ray of Claimant's back and suggested he see another physician for his blood pressure and vision problems, not for treatment of his back pain. Claimant also testified on direct examination that his mental state changed following his accident in that he became more nervous, suffered from headaches and memory loss, experienced an increase in violent thoughts, was quick to anger, and thought about harming others. His testimony contradicts his VA Hospital records which indicated he complained of suffering from these symptoms prior to his accident.

On cross-examination, Claimant testified that he lied about the state of his mental condition in order to obtain an increase in VA disability compensation. He denied, however, reporting to the VA Hospital that he disliked his job and had become dissatisfied with his employment even though the VA Hospital records indicated he made just such a report approximately three (3) months before his accident. Claimant was awarded an increase in his VA disability compensation as a result of his fabricated symptoms. Although Claimant represented to the VA that his mental state had deteriorated prior to his accident, during his cross-examination before the undersigned, Claimant presented a contrary position and maintained that his mental condition had actually not deteriorated until after his December 28, 2001 accident.

Claimant also testified on cross-examination that he is not able to return to his former employment as a welder because of that position's lifting requirements. As a welder, Claimant was required to carry no more than fifty (50) pounds by himself. Despite contending that he could not fulfill the lifting requirements of his former employment, Claimant acknowledged that his post-accident employment at a seafood market required he lift baskets full of shrimp which he estimated weighed between forty (40) and fifty (50) pounds. Claimant additionally testified that both Drs. Kimble and Atkins released him from their care, but not back to work. Claimant's testimony, however, contradicts the records of Drs. Kimble and Atkins which indicated both physicians released Claimant to return to work. Besides denying being released to return to work, Claimant also denied reporting to Dr. Mathai that he could only sit for ten (10) minutes, stand for five (5) minutes, and only lift items up to five (5) pounds in weight although Dr. Mathai's records indicated Claimant reported such limitations to her.

Moreover, in his pre-hearing deposition, Claimant testified that he had not worked anywhere since his last day of employment with Employer. Claimant was videotaped, however, working at a seafood market after his accident. On direct examination during the hearing before the undersigned, Claimant admitted he lied about not working post-accident. He testified that he quit his post-accident employment at the seafood market after he "got into it" with the owner. His testimony is inconsistent with his later direct testimony wherein he testified that he was fired from his employment at the seafood market after he voiced his opinion regarding the owner's representation concerning the freshness of the seafood. On cross-examination, Claimant attempted to reconcile this inconsistency in his testimony by

stating that he was not fired from his employment at the market; but, rather was told "he could go." However, his testimony on cross-examination contradicts his report to Employer/Carrier's vocational rehabilitation counselor, Ms. Favaloro, that he quit his employment at the seafood market because of increased back pain and headaches.

Besides lying in his deposition about his employment activities after his accident, Claimant also lied about his physical limitations. During cross-examination before the undersigned, Claimant admitted that he lied when he testified in his deposition that he could not lift anything, bend, or engage in any physically demanding activity as a result of his accident. He also admitted that he lied when he stated that he suffered from vision problems as a result of his accident.

In sum, I was impressed with the sincerity, testimony, and records of Dr. Culver, Ms. Michel, and Ms. Favaloro. I was unimpressed by the testimony and records of Drs. Sudderth and Macgregor and, accordingly, accord little to no weight to their testimony and records. I was also unimpressed by Claimant's inconsistent and unsupported testimony as I find Claimant's testimony riddled with contradictions, inconsistencies, inexplicable denials, and falsehoods and, accordingly, am unable to credit much of Claimant's testimony. Since I am unable to credit much of Claimant's testimony, I am also unable to credit the records of Drs. Mason and Mathai as their findings are based on Claimant's inaccurate reporting of his symptoms and limitations, particularly that he did not begin to experience "full blown" post-traumatic stress disorder until after his accident and that following his accident he was only able to sit for ten (10) minutes, stand for five (5) minutes, and lift items up to five (5) pounds.

#### **A. The Compensable Injury**

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of

substantial evidence to the contrary - that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused, aggravated, or accelerated** the harm or pain. Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter, 227 F.3d 285, 287 (5<sup>th</sup> Cir. 2000); O'Kelly v. Department of the Army, 34 BRBS 39, 40 (2000); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9<sup>th</sup> Cir. 1986).

#### 1. Claimant's Prima Facie Case

Claimant contends he suffered a compensable injury on December 28, 2001, when he fell at least twenty (20) feet from a ladder while working on a vessel, injuring his head, nose, and back. He additionally contends that his physical injuries prevent him from working. He maintains that working helped him control his pre-existing post-traumatic stress disorder and that his inability to work has caused his post-traumatic stress disorder symptoms to worsen. Employer/Carrier contend Claimant reached maximum medical improvement as to his nose injury on April 15, 2002, and on May 3, 2002, as to his head trauma. Employer/Carrier further contend Claimant's back injury is not causally-related to his December 28, 2001 accident and that his pre-existing post-traumatic stress disorder was not worsened or aggravated by his accident.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See, Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT) (5<sup>th</sup> Cir. 1982). On the other hand, testimony by a discredited witness is insufficient to establish the second element of a **prima facie** case that an injury occurred in the course and scope of

employment, or conditions existed at work which could have caused the harm. Alley v. Julius Garfinckel & Co., 3 BRBS 212, 214-15 (1976).

In the present matter, Claimant was working on a vessel from an unsecured ladder on a work flat when a passing vessel caused the work flat to move. Claimant fell off the ladder as a result of the movement, striking his hands and face on the work flat. After he fell, Claimant sought treatment for his injuries at West Jefferson Medical Center Emergency Department. Claimant was diagnosed as suffering from a fractured nose and was referred to an ENT, Dr. Kimble. Dr. Kimble determined Claimant suffered a nasal fracture as a result of his fall off a ladder on December 28, 2001. During his treatment with Dr. Kimble, Claimant began to complain of headaches. Dr. Kimble suggested Claimant see a neurologist for treatment of his headaches after which Claimant met with a medical case manager, Ms. Michel, to choose a physician to treat his headaches. Claimant chose Dr. Atkins who examined Claimant and determined that he suffered a head injury and vascular headaches as a result of his December 28, 2001 accident.

In the course of his treatment with Dr. Atkins, Claimant reported he was experiencing back pain. Claimant met with Dr. Sudderth upon recommendation from his attorney for treatment of his back pain. Dr. Sudderth concluded Claimant suffered from lumbosacral pain as a result of his December 2001 accident. As previously indicated, I am unable to credit Dr. Sudderth's conclusion regarding Claimant's back pain as Claimant did not complain of back pain until nearly three (3) months after his accident.<sup>6</sup> Therefore, I find Claimant failed to establish that he suffered a harm or pain to his back on December 28, 2001, and that working conditions and activities on that date could have caused, aggravated, or accelerated the harm or pain.

On approximately June 17, 2005, Claimant alleged that his pre-existing post-traumatic stress disorder symptoms worsened following his December 28, 2001 accident. Upon recommendation from his attorney, Claimant was evaluated by Dr. Macgregor who concluded Claimant's post-traumatic stress disorder worsened after his accident. As previously indicated, I am unable to credit Dr. Macgregor's conclusion regarding Claimant's mental

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<sup>6</sup> I also note that I am unable to credit Dr. Mathai's conclusion regarding Claimant's back pain as her conclusion is based Claimant's fallacious reporting of his symptoms and limitations.

condition since Dr. Macgregor relied on Claimant's dubious reported symptoms in forming his conclusion rather than administering any written tests or reviewing findings of psychological testing.<sup>7</sup> Therefore, I find Claimant failed to establish that he suffered an aggravation of his pre-existing post-traumatic stress disorder on December 28, 2001, and that working conditions and activities on that date could have caused, aggravated, or accelerated the harm or pain.

Although Claimant failed to establish that he suffered a harm or pain to his back or pre-existing post-traumatic stress disorder, he established that he suffered a harm or pain to his head and nose on December 28, 2001, and that working conditions and activities on that date could have caused, aggravated, or accelerated the harm or pain. Therefore, I find Claimant has established a **prima facie** case that he suffered an "injury" under the Act and has demonstrated causation sufficient to invoke the Section 20(a) presumption with regard to these injuries. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

## **2. Employer's Rebuttal Evidence**

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See, Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5<sup>th</sup> Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to

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<sup>7</sup> I additionally note that I am unable to credit Dr. Mason's conclusion regarding Claimant's psychiatric condition as her conclusion is based on Claimant's inaccurate reporting of his symptoms.

rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See, Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See, Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, employer must establish that claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See, Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5<sup>th</sup> Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5<sup>th</sup> Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Here, Employer/Carrier did not present any evidence to rebut Claimant's allegations that he suffered a nose injury and head trauma on December 28, 2001. Having not presented any contrary evidence regarding Claimant's allegations, I find Employer/Carrier failed to rebut Claimant's Section 20(a) presumption. As such, a weighing of all the evidence to determine causation regarding Claimant's nose injury and head trauma is unnecessary.

Although Employer/Carrier failed to present evidence to rebut Claimant's allegations regarding his nose injury and head trauma, Employer/Carrier rely on testimony from Claimant's medical case manager, Ms. Michel, a functional capacity evaluation report, and a report from Dr. Culver to rebut Claimant's Section 20(a) presumption regarding his allegations that he suffered a back injury and an aggravation of his pre-existing post-traumatic stress disorder on December 28, 2001. Ms. Michel testified that since Claimant did not complain of back pain until several months after his accident, his back pain was deemed not to be causally-related to his accident. The functional capacity evaluation report from March 2002 indicated Claimant reported suffering from an episode of low back pain **the day prior** to his first day of testing. The report also indicated Claimant reported during his second day of testing that his back pain had lessened. Dr. Culver testified that Claimant waiting until three (3) months after his accident to report a new symptom was consistent with a diagnosis of malingering.

Dr. Culver also testified that, in his opinion, Claimant did not suffer from a psychiatric condition that prevented him from working. According to his testimony, if a patient lies about his symptoms or impairments or exaggerates his symptoms, a diagnosis of post-traumatic stress disorder is questionable as it would be based on factually incorrect data.<sup>8</sup> As I find the evidence presented by Claimant regarding his back injury and pre-existing post-traumatic stress disorder incredulous, a determination whether Employer/Carrier's evidence is sufficient to rebut Claimant's Section 20(a) presumption is unnecessary.

## **B. Nature and Extent of Disability**

Having found Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with Claimant. Trask v. Lockheed Shipbuilding

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<sup>8</sup> I note that had I found Claimant's evidence regarding his pre-existing post-traumatic stress disorder credible, I would nonetheless bar his claim regarding an aggravation of the disorder as a result of the contrary positions he presented before the VA and the undersigned. Although the parties did not raise the issue of judicial estoppel, judicial estoppel may be raised **sua sponte** in "especially egregious case[s]," like the instant case, "where a party has successfully asserted a directly contrary position." U.S. v. C.I.T. Construction Incorporated of Texas, 944 F. 2d 253, 258 (5<sup>th</sup> Cir. 1991).

Construction Co., 17 BRBS 56, 59 (1980). Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). In other words, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968) (per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

### **C. Maximum Medical Improvement (MMI)**

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See, Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask, supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Claimant contends he has not reached maximum medical improvement. Employer/Carrier, on the other hand, contend Claimant reached maximum medical improvement on April 15, 2002, as to his nose injury and on May 3, 2002, as to his head trauma. Dr. Kimble concluded Claimant reached maximum medical improvement on April 15, 2002, as to his nose injury and released Claimant to return to work. According to Claimant, he did not suffer any residual problems from his nose injury after his surgery and treatment with Dr. Kimble. As I find no information in the record to the contrary, I find Claimant reached maximum medical improvement as to his nose injury on April 15, 2002.

Dr. Atkins concluded Claimant reached maximum medical improvement on May 3, 2002, as to his head trauma and released Claimant to return to work. Claimant maintains that his May 26, 2004 appointment with Dr. Atkins shows that he has not reached maximum medical improvement. Dr. Atkins determined after his examination of Claimant on May 26, 2004, that it was unlikely

that Claimant's symptoms would quickly resolve as prior testing indicated Claimant could return to his former employment and that he was malingering. Consequently, Dr. Atkins referred Claimant to a pain management physician. According to Claimant, after his May 26, 2004 appointment with Dr. Atkins, he understood Dr. Atkins to have said that he could do nothing more for him. Therefore, I find based on Claimant's medical records and his pertinent testimony, that Claimant reached maximum medical improvement as to his head trauma on May 3, 2002.

Although Claimant reached maximum medical improvement on April 15, 2002, as to his nose injury and on May 3, 2002, as to his head trauma, Claimant was restricted from working for the period of January 22, 2002 to May 3, 2002. As such, Claimant was unable to perform his regular duties as a welder for Employer. However, since Claimant reached maximum medical improvement he has not returned to work performing his regular duties and earning his regular wage as he maintains he is totally disabled as a result of his back pain and pre-existing post-traumatic stress disorder.

#### **1. Prima Facie Case - Total Disability**

As Claimant could not perform his regular job duties from January 22, 2002 to May 3, 2002, I find Claimant was temporarily totally disabled during that time period.<sup>9</sup> May 3, 2002, was the date at which Claimant's last treating physician released him to return to his former employment as a welder. A functional capacity evaluation performed in March 2002 indicated Claimant could perform medium duty, which was consistent with the requirements of his former employment. Accordingly, I find Claimant has a residual functional capacity of medium duty.

Although Claimant maintains he is unable to return to his former employment due to back pain, there is no credible evidence to indicate Claimant is either permanently partially or totally disabled as a result of a causally-related back injury. There is also no credible evidence to indicate that Claimant suffered an aggravation of his pre-existing post-traumatic stress disorder on December 28, 2001. Since there is no credible evidence in the record to indicate Claimant was prevented from returning to his former employment, I find

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<sup>9</sup> Claimant received temporary total disability compensation from Employer/Carrier during this time period.

Claimant failed to establish a **prima facie** case of permanent and total disability. I also find Claimant failed to establish a loss of wage-earning capacity as based on the record he was able to return to his former employment and earn his regular wages.

## **2. Suitable Alternative Employment**

In general, once a **prima facie** case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5<sup>th</sup> Cir. 1981); P&M Crane Co. v. Hayes, 930 F.2d at 430; Clophus v. Amoco Prod. Co., 21 BRBS 261, 265 (1988). Although Employer/Carrier submitted testimony and evidence regarding suitable alternative employment, the issue need not be addressed as Claimant failed to establish a **prima facie** case of permanent and total disability.

## **D. Entitlement to Medical Care and Benefits**

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. §907(a).

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. §702.402. A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187. Entitlement to medical benefits is never time-barred where a disability is related to a

compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 112 (1996); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4<sup>th</sup> Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury in order to be entitled to such treatment at employer's expense. Schoen v. U.S. Chamber of Commerce, supra.; Anderson v. Todd Shipyards Corp., 22 BRBS 20 (1989); Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the claimant to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33 U.S.C. §907(d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

When a claimant wishes to change treating physicians, the claimant must first request consent for a change, and consent shall be given in cases where a claimant's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. 33 U.S.C. §907(c)(2); 20 C.F.R. §702.406(a) (2004); Armfield v. Shell Offshore, Inc., 25 BRBS 303, 309 (1992) (Smith, J., dissenting on other grounds); Senegal v. Strachan Shipping Co., 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent upon a showing of good cause for change. 33 U.S.C. §907(c)(2).

Though the plain language of Section 7(c)(2) states that the employer may consent to a change of physician for good cause, an employer is not required to do so. Swain v. Bath Iron Works Corp., 14 BRBS 657, 665 (1982) (stating that even if the claimant had established "good cause" for change the employer was not required to authorize the change). In such cases, the district director of the appropriate compensation district may order a change of physicians when a change is "necessary or desirable." 20 C.F.R. §702.406(b) (2004).

Jurisprudence has established several instances where the claimant failed to even demonstrate "good cause" for change. See Lyles v. Stevedoring Services of America, 34 BRBS 303, 305-06 (ALJ) (2000) (denying the claimant a right to change physicians for "good cause" when the claimant was already being treated by a specialist and only sought to change specialists after being released to return to work); Mull v. Newport News Shipbuilding & Dry Dock Co., 29 BRBS 739, 741-43 (ALJ) (1995) (no "good cause" to change physicians exists when the claimant consciously chose a treating physician, that physician treated her for seven months, she chose another specialist in the same field without gaining approval from the employer, and when she only sought to change physicians after the first physician opined that her injuries were not work-related); Cf. Baily v. Palmetto Shipbuilding & Stevedoring Co., 27 BRBS 370 (ALJ) (1993) (finding that the death of the claimant's prior treating physician constituted "good cause" to change treating physicians); Gaudet v. New Orleans Shipyard, 24 BRBS 31 (1990) (ALJ) (finding the employer was required to consent to a change in physicians for "good cause," and labeling the change as a "referral" when the claimant sought a change of orthopaedist for a specific purpose, namely that the second orthopaedist was a "leading spine surgeon" who was more capable of performing the particular operation).

Here, Claimant chose Dr. Atkins as his treating physician. In March 2002 Claimant complained of back pain to Dr. Atkins after which Dr. Atkins ordered an x-ray of Claimant's back. Dr. Atkins at no point refused Claimant treatment. Despite treating with Dr. Atkins, Claimant obtained treatment from Dr. Sudderth for his back pain upon recommendation from his attorney. Claimant did not request authorization from Employer/Carrier to treat with Dr. Sudderth. As the record clearly shows Dr. Atkins never refused Claimant treatment and had taken steps to treat Claimant's back pain, and shows further that Claimant never

sought authorization from Employer/Carrier to treat with Dr. Sudderth, I find Claimant's treatment with Dr. Sudderth was unauthorized. As such, Employer/Carrier are not responsible for payment and reimbursement of bills and expenses associated with treatment provided by Dr. Sudderth.

Besides seeking payment and reimbursement of bills and expenses associated with treatment provided by Dr. Sudderth, Claimant also seeks payment and reimbursement of bills and expenses associated with treatment provided by Dr. Macgregor. Claimant obtained treatment from Dr. Macgregor for his psychiatric condition upon recommendation from his attorney. He did not request authorization from Employer/Carrier to see Dr. Macgregor nor did he report any psychiatric problems to Dr. Atkins. Since Claimant never sought authorization from Employer/Carrier to treat with Dr. Macgregor, I find Claimant's treatment with Dr. Macgregor was unauthorized. Accordingly, Employer/Carrier are not responsible for payment and reimbursement of bills and expenses associated with treatment provided by Dr. Macgregor.

Having found Claimant suffered from compensable injuries to his nose and head, Employer/Carrier are responsible for appropriate, reasonable, and necessary medical care for Claimant's nose and head injuries from his work-related accident of December 28, 2001.

#### **V. SECTION 8(f) RELIEF**

Section 8(f) of the Act provides in pertinent part:

(1) In any case which an employee having an existing permanent partial disability suffers [an] injury . . . of total and permanent disability or of death, found not to be due solely to that injury . . . the employer shall provide in addition to compensation under paragraphs (b) and (e) of this section, compensation payments or death benefits for one hundred and four weeks only.

(2)(A) After cessation of the payments . . . the employee . . . shall be paid the remainder of the compensation that would be due out of the special fund established in section 44.

33 U.S.C. § 908(f).

Section 8(f) shifts liability for permanent partial or permanent total disability from the employer to the Special Fund when the disability is not due solely to the injury which is the subject of the claim. Director, OWCP v. Cargill Inc., 709 F.2d 616, 619 (9th Cir. 1983).

Section 8(f) is to be liberally applied in favor of the employer. Maryland Shipbuilding and Drydock Co. v. Director, OWCP, 618 F.2d 1082 (4th Cir. 1980); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980), aff'g Ashley v. Todd Shipyards Corp., 10 BRBS 423 (1978). The reason for this liberal application is to encourage employers to hire disabled or handicapped individuals. Lawson v. Suwanee Fruit & Steamship Co., 336 U.S. 198 (1949).

The employer must establish three prerequisites to be entitled to relief under Section 8(f) of the Act: (1) the claimant had a pre-existing permanent partial disability, (2) the pre-existing disability was manifest to the employer, and (3) the current disability is not due solely to the employment injury. 33 U.S.C. §908(f); Two "R" Drilling Co., Inc. v. Director, OWCP, 894 F.2d 748, 750 (5th Cir. 1990); Director, OWCP v. Campbell Industries, Inc., 678 F.2d 836 (9th Cir. 1982), cert. denied, 459 U.S. 1104 (1983); C&P Telephone Co. v. Director, OWCP, 564 F.2d 503 (D.C. Cir. 1977), rev'g 4 BRBS 23 (1976); Lockhart v. General Dynamics Corp., 20 BRBS 219, 222 (1988).

"Pre-existing disability" refers to disability in fact and not necessarily disability as recorded for compensation purposes. C&P Telephone Co. v. Director, OWCP, supra, at 513. Disability as defined in Section 8(f) is not confined to conditions which cause purely economic loss. Id. Disability includes physically disabling conditions serious enough to motivate a cautious employer to discharge the employee because of a greatly increased risk of employment related accidents and compensation liability. Campbell Industries Inc., supra; Equitable Equipment Co., Inc. v. Hardy, 558 F.2d 1192, 1197-99 (5th Cir. 1977).

An employer may obtain relief under Section 8(f) of the Act where a combination of the claimant's pre-existing disability and his last employment-related injury result in a greater degree of permanent disability than the claimant would have incurred from the last injury alone. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 1110 (4th Cir. 1982); Comparsi v. Matson Terminals, Inc., 16 BRBS 429 (1984).

Employment related aggravation of a pre-existing disability will suffice as contribution to a disability for purposes of Section 8(f), and the aggravation will be treated as a second injury in such case. Strachan Shipping Company v. Nash, 782 F. 2d 513, 516-517 (5th Cir. 1986) (en banc).

In this case, the record shows Claimant received several awards of compensation for post-traumatic stress disorder. However, Claimant failed to establish that his pre-existing post-traumatic stress disorder was aggravated by his December 28, 2001 accident. Therefore, I find Section 8(f) relief inapplicable in the instant case.

#### **VI. ATTORNEY'S FEES**

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition.<sup>10</sup> Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

#### **VII. ORDER**

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

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<sup>10</sup> Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1<sup>st</sup> Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 21, 2005**, the date this matter was referred from the District Director.

1. Claimant's claim for additional temporary total disability compensation under the Longshore and Harbor Workers' Compensation Act, arising from a work-related accident of December 28, 2001, is denied.

2. Claimant's claim for payment and reimbursement of bills and expenses associated with treatment provided by Drs. Sudderth and Macgregor pursuant to the provisions of Section 7 of the Act is denied. 33 U.S.C. §907.

3. Employer/Carrier are responsible for and shall pay all reasonable, appropriate, and necessary medical expenses arising from Claimant's December 28, 2001, work injury to his nose and head pursuant to the provisions of Section 7 of the Act. 33 U.S.C. §907.

4. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

**ORDERED** this 12th day of June, 2007, at Covington, Louisiana.

**A**

LEE J. ROMERO, JR.  
Administrative Law Judge